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IN THE

Supreme Court of the United States

RICHARD SINGLETON, RUTH SINGLETON and AMY SINGLETON,

Petitioners,

v.

VOLKSWAGEN OF AMERICA, INC., and VOLKSWAGEN AG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The plaintiffs sued Volkswagen in the Eastern District of Texas, Marshall Division, for defectively designing a seat in their hatchback – a tort they allege caused the death of one family member and the paraplegia of another. Volkswagen unsuccessfully moved to transfer the case to a venue 155 miles away, the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. § 1404(a). It then petitioned the court of appeals for a writ of mandamus. After two panels of the Fifth Circuit heard the petition and reached opposite results, a sharply divided full court granted the writ. The *en banc* majority revisited the district court's decision on each of the many traditional factors governing § 1404(a) motions, concluded the court had erred in analyzing and balancing them, and ordered the transfer because the errors added up to a "clear abuse of discretion" yielding a "patently erroneous result." Seven judges dissented. Commentators and courts have repeatedly recognized what one court called a "hopeless conflict" over whether mandamus is available to review claimed abuses of discretion in § 1404(a) rulings, thousands of which issue each year. This Court has twice expressly deferred decision on this important question.

The question presented is:

Does the All Writs Act authorize a court of appeals to (i) conduct interlocutory review of a district court's ruling under 28 U.S.C. § 1404(a) for abuse of discretion, (ii) reconsider the district court's weighing and balancing of the factors at issue, and (iii) reverse the transfer decision and determine the venue, all in the undisputed absence of any action by the district court beyond its power or jurisdiction?

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Ford Motor Co. v. Ryan,
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Gulfstream Aerospace Corp. v. Mayacamas Corp.,
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Cited Authorities

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Other Authorities:

Stowell R.R. Kelner, *"Adrift on an Uncharted Sea": A Survey of Section 1404(a) Transfer in the Federal System*, 67 N.Y.U. L. REV. 612 (1992) 13, 27

Carolyn Kelly MacWilliam, 28 A.L.R. Fed. 2d 311 (2008) 13, 25, 26

Mary Alice Robbins, *5th Circuit Grants Mandamus on Venue Dispute in Eastern District*, 24 TEX. LAWYER 1 (October 20, 2008) 28

David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443 (1990) 27

Sutherland Legal Alert, *Fifth Circuit Ruling May Aid Defendants with Transfer of Venue Requests in Eastern District (and Other Districts) of Texas, www.sutherland.com* (2008) 28

17 Georgene M. Vairo, *Moore's Federal Practice* § 111.13 (3d ed. 2008) 19

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15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3855 (3d ed. 2007) ..... *passim*

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit sitting *en banc*, dated October 25, 2007, is reported at *In re Volkswagen of America*, 545 F.3d 304 (5th Cir. 2008), and reprinted at Appendix ("App.") A, 1a-48a. The decision of the second panel of the court of appeals to hear Volkswagen's petition for writ of mandamus, dated October 10, 2008, following the first panel's granting of Volkswagen's motion for rehearing, is reported at *In re Volkswagen of America*, 506 F.3d 376 (5th Cir. 2007), and reprinted at App. B, 49a-72a. The decision of the first panel of the court of appeals to hear the petition, dated February 13, 2007, is unreported and is reprinted at App. C, 73a-76a. The decisions of the district court denying Volkswagen's § 1404(a) motion and motion for reconsideration are unreported and are reprinted at App. D-E, 77a-93a.

JURISDICTION

The court of appeals granted the petition for writ of mandamus on October 10, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

INTRODUCTION

Motions to transfer cases to more convenient venues under 28 U.S.C. § 1404(a) are a staple of federal district court litigation, but there has long been uncertainty about the scope of interlocutory review of the orders issued under this section. Because district court rulings resolving § 1404(a) motions are not interlocutorily appealable under 28 U.S.C. §§ 1291 or 1292(a), litigants often petition the courts of appeals for review under 28 U.S.C. § 1651(a), the All Writs Act, seeking a writ of mandamus reversing the transfer decision.

Courts of appeals largely agree that certain types of orders made in excess of the district court's power under § 1404(a) – such as a transfer to a district that is not one where the case originally "might have been brought," 28 U.S.C. § 1404(a), a decision ignoring an applicable forum selection clause, or a ruling that totally fails to apply the established factors used to assess transfer requests – are properly the subject of mandamus review. But they disagree vigorously over whether the All Writs Act may be used to go further and substantively reassess the district court's treatment of the proper § 1404(a) considerations, reweigh and rebalance the factors, and reverse the ruling as an "abuse of discretion."

In this case, the Fifth Circuit, sitting *en banc*, granted a writ of mandamus reversing a district court decision denying a motion to transfer. The trial court decision thoroughly considered and applied all the traditional factors governing § 1404(a) motions. But the Fifth Circuit overturned it simply because it disagreed with how the district court analyzed and weighed the factors, and with the outcome of its discretionary balancing. Six judges joined Judge Carolyn Dineen King's dissent from the majority's aggressive use of the All Writs Act.

On two occasions, this Court has deferred decision on the scope of mandamus review of § 1404(a) decisions, but the conflicts have only become more entrenched in the years since. The Sixth, Seventh, Eleventh and District of Columbia Circuits join the Fifth in their willingness to review the substance of trial court weighing and balancing for abuse of discretion – while the First, Third, Fourth and Ninth Circuits reserve the writ in § 1404(a) cases for abuses of jurisdiction and power, not discretion. The other courts have their own, intra-circuit conflicts. Courts and commentators like Wright and Miller and Moore have long lamented the uncertainty surrounding this question. Thousands of transfer motions are decided each year; yet litigants face very different prospects on mandamus review depending on the circuit involved. At bottom, this case asks whether transfer motions will continue to be decided by district judges in the exercise of their discretion, or whether the decisions will increasingly be made by appellate panels, with all the delay, inefficiency and violence to the final judgment rule such expanded interlocutory review entails.

STATEMENT OF THE CASE

A. Factual Background

This case stems from a product liability lawsuit brought by the Singleton family against Volkswagen alleging that the defective design of their 1999 Golf two-door hatchback caused the death of seven-year-old Mariana Singleton and left her grandfather Richard Singleton a paraplegic. App. 2a., 31a-32a, 83a.

On May 21, 2005, the Singletons were traveling on an interstate highway in Dallas when their Golf was rear-ended by another car and projected rear-first into a flat bed trailer parked on the freeway's shoulder. App. 83a. Richard's front seat back did not remain upright following impact but snapped backward, thrusting his body rearward and fracturing his spine. App. 31a. Mariana, seated directly behind Richard, struck and was then trapped by the collapsed seat back. *Id.* She was transported to a nearby hospital but died shortly afterward of severe cranial trauma. *Id.*

In order to prove their claims, the Singletons will look to documents maintained by Volkswagen outside Texas and the United States regarding the design, testing, and safety of Richard's seat. The key witnesses regarding their claims will consist of Volkswagen engineers and officials who live outside Texas, and expert witnesses in automotive design and safety. App. 32a. The basic facts of how the collision occurred – where the cars were, their estimated speeds, what happened immediately after impact, and the like – are neither contested by the Singletons nor the subject of conflicting

fact witness testimony. There are no liability-related documents located in Dallas other than a seven-page accident report. VW App. 46a-52a.[1] Nor do there appear to be voluminous, relevant medical records there. The Singletons have warehoused the wrecked Golf in Dallas, but they will produce it wherever and whenever necessary. VW App. 76a.

At the time of the accident, the Singletons lived in Collin County in the Eastern District of Texas. App. 86a. Collin County is adjacent to Dallas County, and the county line separating them divides the Eastern from the Northern Districts. Richard and his wife Ruth Singleton now reside in Dallas, and their daughter and Mariana's mother Amy Singleton now lives in Kansas. App 26a. The driver of the car that struck the Singletons' Golf, Colin Little, lives in Dallas County but has signed an affidavit affirming that he does not object to trial in Marshall. App. 32a. The trailer was owned by a nursery located in Denton County, also adjacent to Dallas County and in the Eastern District, and was driven by its employee. App. 83a. The sole third party witness to the collision and a Dallas police officer who filled out an accident report live in Dallas County and executed form affidavits averring that it would be "an unreasonable burden and hardship as well as inconvenience" for them to drive two hours east to Marshall for trial. App. 87a; VW App. 63a-66a. In its motion to transfer the case, Volkswagen listed other people in Dallas – including the wrecker driver, EMS

1. Volkswagen filed an appendix in the court of appeals in support of its petition for a writ of mandamus. Citations in this petition to "VW App" are to this appendix.

personnel and the medical examiner – but it has never explained why these people are relevant to the claims and defenses in the case or why they might be likely to testify. App 87a-88a; VW App. 20a, 61a. Nor did these people provide affidavits of any kind. App. 87a-88a. Mariana's teachers, neighbors and friends, who could provide damages-related testimony about her life, reside in the Eastern District in Collin County. App. 37a-38a.

B. The District Court's Transfer Ruling

Having lived in the Eastern District of Texas when they were injured, the Singletons filed suit against Volkswagen in their former home district, in the Marshall Division, on May 30, 2006. App. 83a. They filed in federal district court under 28 U.S.C. § 1332 in light of the parties' diversity of citizenship. *Id.* In response, Volkswagen filed a third party complaint against Little and moved to transfer the case to the Northern District of Texas, Dallas Division, pursuant to § 1404(a).

In a lengthy and comprehensive memorandum opinion and order dated September 12, 2006, the district court denied Volkswagen's motion. App. 82a-93a. After reciting the facts and applicable law, the district court carefully applied each of the private and public interest factors traditionally relevant to § 1404(a) motions. *Id.*[2]

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2. The district court considered the following relevant "convenience factors": (1) the plaintiff's choice of forum, (2) the convenience of the parties and material witnesses, (3) the place of the alleged wrong, (4) the cost of obtaining the attendance of witnesses and the availability of compulsory process, (5) the accessibility and location of sources of proof;

(Cont'd)

The court began by noting conventionally that "[t]he plaintiff's choice of forum will not be disturbed unless it is clearly outweighed by other factors." App. 85a. It then assessed the convenience of the parties and witnesses, concluding that the 155-mile distance between Dallas and Marshall is not "far enough to weigh substantially in favor of transfer." App. 87a. The court observed that the inquiry should focus on key witnesses, and that Volkswagen had failed to explain why many of the individuals it listed, such as EMS and wrecker employees, were relevant. App. 87a-88a.

As for the place of the alleged wrong, the court noted that the collision occurred in Dallas, but it also recognized that the Gulf was designed outside Texas. App. 88a. Overall, the court concluded that this factor weighed slightly in favor of transfer. *Id.* With regard to the attendance of witnesses, the court held that those in Dallas would be available for trial in Marshall, if necessary, given the court's statewide subpoena power under Fed. R. Civ. P. 45(c)(3). App. 89a. Turning to the location of proof, the district court noted that this factor carries less weight in the current era of computerized document management technology. App. 90a. The

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(Cont'd)

and (6) the possibility of delay and prejudice if transfer is granted. App. 61a-62a. It also listed relevant "public interest factors": (1) the administrative difficulties caused by court congestion, (2) the local interest in adjudicating local disputes, (3) the unfairness of burdening citizens in an unrelated forum with jury duty; and (4) the avoidance of unnecessary problems in conflict of laws. *Id.* There is no dispute in this case that these are the factors relevant to a § 1404(a) motion. App. 21a.

district court then analyzed the public interest factors and acknowledged Dallas's local interest in the case as the site of the collision, but also noted the Eastern District's interest in the presence of an allegedly dangerous product in its midst. App. 91a.

In all, the district court gave thorough and rigorous consideration to the motion and held that "some factors weigh in favor of a transfer," but ultimately concluded that Volkswagen failed to carry its burden under § 1404(a). App. 93a. Volkswagen then moved for reconsideration, which the district court also denied. App. 77a-81a. In this order, the court made clear that "decisive weight" had not been given to the Singletons' choice of forum, but that it was simply one of many factors in play. App. 79a.

C. Decisions of the Court of Appeals

On January 23, 2007, Volkswagen petitioned the court of appeals for a writ of mandamus ordering the district court to transfer the case to Dallas. A panel of the court (Higginbotham, King and Garza J.J.), denied the petition in an unpublished *per curiam* decision noting the court's unwillingness "to substitute our own balancing of the transfer factors for that of the district court." App. 75a. Judge Garza dissented. App. 76a.

Volkswagen then petitioned for rehearing *en banc*, which the panel elected to treat as a petition for panel rehearing and granted. App. 52a. The case, however, was then assigned to a different panel for rehearing and

oral argument. *Id.* This second panel (Jolly, Clement, Owen, J.J.) granted the writ. App. 49a-72a. The Singletons then successfully petitioned for rehearing *en banc*.

On October 10, 2008, the full court of appeals granted Volkswagen's petition for writ of mandamus. The majority (Jones, C.J., Jolly, Smith, Barksdale, Garza, Clement, Owen, Elrod, Southwick and Haynes, J.J.) began by observing that the writ will issue in "'exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.'" App. 7a (quoting *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004)). It purported to distinguish, however, between "mere abuse of discretion" and "clear abuse of discretion." App. 8a. "Admittedly," the court conceded, "the distinction . . . cannot sharply be defined for all cases." *Id.* Nonetheless, the court undertook to show why the district court's decision was not merely an abuse of discretion but a "clear" one.

To accomplish that task, the court of appeals reviewed each of the § 1404(a) factors and, in each instance, arrived at conclusions at odds with those of the district court. First, it examined the plaintiff's choice of venue and, despite the district court's express holding that the plaintiff's selection was not dispositive but simply one among many relevant factors, the court concluded that the district court gave "inordinate weight to the plaintiff's choice of venue." App. 20a. Next, the court examined the "access to sources of proof" factor and concluded that the district court overvalued advances in information technology, though the majority

did not specify what relevant documents besides the police report actually exist in Dallas, mention Volkswagen's voluminous documents outside Texas, or meaningfully grapple with the fact that, today, documents are almost invariably handled electronically in any case. App. 23a-24a.

The court then determined, contrary to the district court, that the subpoena power factor favors transfer because the Dallas court would enjoy "absolute" subpoena power over trial and discovery witnesses. App. 24a. The court also differed with the district court over the extent of inconvenience imposed by the 155-mile distance separating Marshall from Dallas and held that whenever the distance exceeds 100 miles, this factor will support transfer. App. 24a-26a. The court did not consider the materiality of potential witnesses listed by Volkswagen or address the district court's unremarkable view that the inquiry should focus on key witnesses. *Id.* Finally, the majority disagreed with the district court's weighing of the local interest factor, giving no weight to Marshall's interest in safe products, ignoring Volkswagen's conduct outside Texas, and giving greater weight to Dallas's interest in the case. App. 26a-27a.

Having thus reanalyzed and reweighed each § 1404(a) factor, the majority concluded that the writ should issue because, in its view, the district court committed a "clear abuse of discretion" producing a "patently erroneous result," Volkswagen lacked an adequate appellate remedy, and the issues involved "have an importance beyond this case." App. 29a-30a.

Seven judges (King, Davis, Wiener, Benavides, Stewart, Dennis and Prado, J.J.) dissented. The dissenters began by stressing the true focus of the case as a product liability lawsuit against a multinational company, rather than simply an isolated and localized Dallas car accident. App. 31a-32a. After noting the confusion inherent in the majority's attempted distinction between "mere" and "clear" abuses of discretion, the dissent reviewed the majority's disagreements with the district court's treatment of the § 1404(a) factors and, in each case, demonstrated the reasonableness of the district court's view of the facts at hand, while acknowledging that different judges could rationally reach different conclusions. App. 34a-39a. In addition, the dissent correctly pointed out that direct appeal is available to correct erroneous transfer decisions. App. 39a-40a. Most importantly, the dissent comprehensively elucidated the conflict between the majority's approach to mandamus and the longstanding precedent of this Court reserving the writ for extraordinary abuses of power. App. 41-48a.[3]

REASONS FOR GRANTING THE PETITION

Since enactment of § 1404(a) in 1948 and the earliest subsequent attempts to obtain interlocutory review of transfer rulings, there have been strenuous critics of using mandamus in this setting. Wright and Miller comment that mandamus is not controversial "if the issue goes to the power of the district court to make the

3. On October 29, 2008, the Singletons moved the court of appeals to stay its mandate pending this Court's decision on certiorari. *See* 28 U.S.C. § 2101(f); Fed. R. App. P. 41(d)(2)(A). The court has not yet decided the motion.

order it did and only a question of law is presented." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3855 at 325 (3d ed. 2007). By contrast:

> But a very compelling argument can be made that if there is no question of power, and the only issue is whether the district judge exercised his or her discretion properly in considering the factors mentioned in the statute in granting or refusing the transfer, interlocutory review ought not be available. This is the view of the commentators, it is the view of the American Law Institute, and it has been the view of many distinguished appellate judges.

Id.

Nonetheless, this Court has twice refused to decide the scope of mandamus review of transfer decisions, first in *Norwood v. Kirkpatrick*, 349 U.S. 29, 33 (1955), and later in *Van Dusen v. Barack*, 376 U.S. 612, 615 n. 3 (1964). Courts of appeals have consequently divided on the subject over the years. Wright and Miller continue:

> Almost all courts agree that the writs can be used if the trial court made an error of law, as by transferring a case to a forum that is not proper under the statute, or considering an impermissible factor in passing on the motion, or by failing to give a proper hearing to the parties . . . On the other hand, there is no agreement on the use of the writs to review

> the trial court's exercise of its discretion. A half-century ago, the Supreme Court passed up an opportunity to provide guidance on this question and the decisions of the courts of appeals, as several of them have remarked, are "in hopeless conflict." Indeed the variations among the courts of appeal, and the changes of view within a particular appellate court, are so great that the law on this point must be examined on a circuit-by-circuit basis.

15 Wright, Miller & Cooper, § 3855 at 330-32. Moore's treatise makes the same point, as does a 2008 American Law Report. *See* 17 Georgene M. Vairo, *Moore's Federal Practice* § 111.61 at 111-202-03 (3d ed. 2008); Carolyn Kelly MacWilliam, 28 A.L.R. Fed. 2d 311, 331 (2008) (same); *see also* Stowell R.R. Kelner, *"Adrift on an Uncharted Sea": A Survey of Section 1404(a) Transfer in the Federal System*, 67 N.Y.U. L. REV. 612, 631 (1992) ("The use of the writ of mandamus in this area is unsettled").

Most courts of appeals – including the Fifth Circuit – have joined commentators in recognizing the confusion and conflict when it comes to the scope of mandamus review of § 1404(a) decisions. For example, the Eleventh Circuit has observed: "There is substantial disagreement among the circuits, and some apparent confusion within the respective circuits, concerning the appropriate role of mandamus as a remedy for abuses of discretion by district courts in deciding motions under § 1404(a)." *Roofing and Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 987 (11th Cir. 1982); *see also National-Standard Co. v. Adamkus*, 881

F.2d 352, 356 n. 3 (7th Cir. 1989); *Hustler Magazine, Inc. v. U.S. Dist. Ct.*, 790 F.2d 69, 70 (10th Cir. 1986) ("Cognizant that a thorny thicket abounds in this area, we are reluctant to compound the tangle"); *In re Cragar Indus., Inc.*, 706 F.2d 503, 504 (5th Cir. 1983) (mandamus reviewability "expressed in uneven terms throughout the country and within this circuit"); *Wilkins v. Erickson* 484 F.2d 969, 971 (8th Cir. 1973) (extent of mandamus review "varies widely among the federal appellate courts"); *Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16, 18 (9th Cir. 1969) ("circuits are drastically divided on the question"); *Lemon v. Druffel*, 253 F.2d 680, 683 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958); *Clayton v. Warlick*, 232 F.2d 699, 703 (4th Cir. 1956) ("hopeless conflict").

The Court should now resolve this conflict by reaffirming that mandamus is limited to extraordinary cases where courts exceed their jurisdiction or abuse their authority and power – not the correction of error, however "clear" or "patent" it may strike particular appellate judges. Otherwise, the lower courts and litigants will continue to face the problem in an *ad hoc*, circuit-by-circuit and sometimes panel-by-panel fashion, at great cost to the final judgment rule as well as the important institutional values of efficiency and trial court discretion.

I. The Court Should Grant the Petition to Resolve the Conflicts and Confusion Surrounding the Use of Mandamus to Review Transfer Rulings

A. The Decision of the Court of Appeals Conflicts with This Court's Mandamus Decisions

Although *Norwood* and *Van Dusen* did not resolve the scope of mandamus review in § 1404(a) cases, this Court's other mandamus decisions make clear that the writ is not intended to control the discretionary decisions of district courts, but simply to ensure they do not exceed their jurisdiction. As early as 1835, Chief Justice Marshall cautioned that mandamus should not "direct in what manner the discretion of an inferior tribunal shall be exercised." *Life and Fire Ins. Co. of N.Y. v. Adams*, 34 U.S. 573, 602 (1835). An appellate court may not "exercise appellate jurisdiction previous to a final judgment or decree . . . [or] intrude itself into the management of a case requiring all the discretion of the district judge, and usurp his powers." *Id.* at 604; *see also Ex Parte Morgan*, 114 U.S. 174, 175 (1885); *Ex Parte Newman*, 81 U.S. 152, 165-66 (1871).

Rather, mandamus exists to confine district courts to their proper jurisdiction. "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify" mandamus. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980); *accord Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). As this Court put it when denying a writ sought to compel a remand: "Whether the ruling was right or wrong, it was a judicial act, done in the exercise of a jurisdiction conferred by law, and, even if

erroneous, was not void or open to collateral attack, but only subject to correction in an appropriate appellate proceeding." *Ex Parte Roe*, 234 U.S. 70, 72-73 (1914); *accord Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402-03 (1976); *Will v. U.S.*, 389 U.S. 90, 95 (1967); *Parr v. U.S.*, 351 U.S. 513, 520 (1956); *DeBeers Consol. Mines v. U.S.*, 325 U.S. 212, 217 (1945); *Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 26-27 (1943).[4]

In *Banker's Life & Cas. Co. v. Holland*, the Court applied these basic principles to a petition for mandamus seeking to vacate a transfer order entered under 28 U.S.C. § 1406(a), which mandates dismissal or transfer of cases filed in improper venues. *See* 346 U.S. 379 (1953). The district court found that one defendant did not reside in the district where suit had been brought and severed and transferred the case against him. *See id.* at 380-81. In affirming the denial of mandamus by the court of appeals, this Court made clear that the district court acted well within its jurisdiction:

> [The district court's] decision against petitioner, even if erroneous – which we do not pass upon – involved no abuse of judicial

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4. This Court has sanctioned use of the writ by courts of appeals to supervise and correct district courts that persistently and deliberately violate the rules of civil procedure. *See, e.g., Schlagenhauf v. Holder*, 379 U.S. 104, 110-11 (1964); *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 313-15 (1957). As Judge Friendly has pointed out, however, these decisions are best understood as examples of using the writ to prevent trial judges from exceeding their authority – "a traditional use of mandamus." *See A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 446 (2d Cir. 1966) (Friendly, J., dissenting).

> power, and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction.

Id. at 382-83 (internal citations omitted).

There is no way to square the majority's decision in this case with *Banker's Life* and the Court's other mandamus decisions. Section 1406(a) is obviously "analogous" to 1404(a). *Van Dusen*, 376 U.S. at 621 n. 11. And as Judge King's dissent makes clear, the phrase "abuse of discretion" in *Banker's Life* and subsequent mandamus decisions, such as *Cheney*, refers to those transgressions by the district court that exceed its power or jurisdiction – not more prosaic errors that strike the reviewing court as so "clear" or "patent" that they may as well be addressed sooner rather than later. App. 43a-46a. In fact, it is notable that, when this Court referred to mandamus being available to correct "a clear abuse of discretion" in *Cheney*, it cited *Banker's Life*. *See* 542 U.S. at 380; *accord Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 309 (1989) (same).

Nor can the decision below be reconciled with this Court's holding in *Allied Chemical* that "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" 449 U.S. at 36. There is no debate that

§ 1404(a) decisions are committed to the discretion of the district court. *See, e.g.*, *Norwood*, 349 U.S. at 32.

In this case, the court of appeals simply revisited the district court's conclusions on each of the § 1404(a) factors, reached a different judgment about them, and ordered the transfer. For example, the district court did not see great savings in convenience given the 155-mile distance separating Dallas and Marshall, whereas the court of appeals assigned greater weight to the extra distance extending beyond what it called a "100-mile threshold" for witness travel. The courts also disagreed on how to value advances in copying technology and how much weight to assign "key" witnesses versus those simply listed in moving papers. The court of appeals placed great weight on Dallas as the site of the collision, while the district court saw this as favoring transfer only "slightly" and discerned some interest by Marshall residents in safe products. The majority stated that the case had no connection to the city of Marshall, but it ignored connections to the Eastern District and, more importantly, overlooked that the § 1404(a) question was simply whether transfer would materially advance convenience, not whether the case arose in Marshall.

In short, what divided the district court from the court of appeals were run-of-the-mill differences in judgment and degree of the sort that can split any two judges or courts. Notwithstanding these contrasting, nuanced views of the facts and their application to the § 1404(a) criteria, it is clear that the district court acted within its power and jurisdiction in considering and then ruling one way or the other on Volkswagen's motion. Its order was unquestionably "a judicial act, done in the

exercise of a jurisdiction conferred by law." *Roe*, 234 U.S. at 72. Nor did its approach to the § 1404(a) factors diverge from that of most other district courts.[5] The Fifth Circuit itself once held that a 203-mile difference between districts represented a "minor inconvenience" that can "in no rational way support the notion of abuse of discretion" in a § 1404(a) order. *Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir. 1988). In this case, it simply abandoned this earlier view and stepped in to "control the decision of the trial court" for no other reason than it disagreed with it. *Banker's Life*, 346 U.S. at 383.

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5. For example, in observing that the Singletons' choice of forum should be respected unless "clearly outweighed by other factors," App. 85a, the district court used a common formulation employed by most other courts, and indeed, the Fifth Circuit prior to the decision below. *See, e.g.*, 17 *Moore's* § 111.13[1][c] at 111-68; *Howell v. Tanner*, 650 F.2d 610, 616 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982). Similarly, the district court's focus on key witnesses, rather than all names listed by the parties in their moving papers, App. 87a, is a standard approach. *See* 15 Wright, Miller & Cooper § 3851 at 221-35. Many trial courts also treat distances like those involved here as *de minimus*. *See, e.g., Boronstein v. Sands Hotel, Casino & Country Club, Inc.*, 775 F. Supp. 657, 658 (S.D.N.Y. 1991) (NY-Atlantic City; approximately 130 miles); *Williams v. Kerr Glass Manuf. Corp.*, 630 F. Supp. 266, 270 (E.D.N.Y. 1986) (160 miles); *Leesona Corp. v. Duplan Corp.*, 317 F. Supp. 290, 300 (D.R.I. 1970) (200 miles). And many courts deemphasize the "location of proof" factor in this age of computerized document maintenance. App. 66a; 17 *Moore's* § 111.13[1][h] at 111-85.

B. The Courts of Appeals are in Conflict Regarding the Use of Mandamus to Overturn Transfer Rulings for Abuse of Discretion

The courts of appeals have adopted widely divergent approaches to the use of mandamus to address claimed abuses of discretion in transfer decisions. On the one hand, the First, Third, Fourth and Ninth Circuits will engage in virtually no mandamus review for abuse of discretion in the trial court's balancing of the § 1404(a) factors. In *In re Josephson*, 218 F.2d 174 (1st Cir. 1954), the First Circuit held, "we do not think that 28 U.S.C. § 1651 grants us a general roving commission to supervise the administration of justice in the federal district courts," and specifically rejected the claim that transfer decisions should be scoured for abuse of discretion: "[W]e are clear that as a matter of general policy we ought not go into that in the present proceeding. 'Abuse of discretion' is a phrase which sounds worse than it really is." *Id.* at 182. The First Circuit continues to take this approach. *See* 15 Wright, Miller & Cooper, § 3855 at 335.

Similarly, the Third Circuit holds that "a writ will only issue if the district court did not have the power to enter the [transfer] order." *Sunbelt Corp. v. Noble, Denton & Assoc., Inc.*, 5 F.3d 28, 30 (3d Cir. 1993); *accord In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 379 (3d Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003). This restrictive treatment stems from an early, influential decision, *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010 (3d Cir. 1952), which foreswore "review where the judge in the district court has considered the interests stipulated in the statute and decided thereon . . ."

Id. at 1011. The court recognized that "the view we express is not the one which some of our judicial brethren are following," but it could not "escape the conclusion that it will be highly unfortunate if the result of an attempted procedural improvement is to subject parties to two lawsuits: first, prolonged litigation to determine the place where a case is to tried; and, second, the merits of the alleged cause of action itself." *Id.* at 1011-12.[6]

The Fourth Circuit initially reviewed transfer decisions under the All Writs Act for abuse of discretion. *See, e.g., Akers v. Norfolk and Western Ry. Co.*, 378 F.2d 78, 80 (4th Cir. 1967). But in *In re Ralston Purina Co.*, 726 F.2d 1002 (4th Cir. 1984), it held that this Court's decision in *Allied Chemical* requires a more stringent standard, proscribes abuse of discretion review in § 1404(a) cases, and limits the writ to "cases of abuse of judicial power." *Id.* at 1004-05. And in *In re Catawba Indian Tribe of S. Carolina*, 973 F.2d 1133 (4th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993), the court further clarified its view that this Court's use of the phrase "clear abuse of discretion" in the § 1404(a) mandamus context "equates . . . with the 'usurpation of the judicial power'

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6. In *Shutte v. Armco Steel Corp.*, 431 F.2d 22 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the Third Circuit used the "clear abuse of discretion" formulation and reversed a transfer order where the district court failed to consider whether suit could have been brought in the transferee district. *See id.* at 23-25. In *Solomon v. Continental American Life Ins. Co.*, 472 F.2d 1043 (3d Cir. 1973), however, the court clarified that *Shutte* did not alter the basic rule that "the extraordinary writs will issue only where the trial court exceeded its authority or acted outside its jurisdiction." *Id.* at 1045.

standard." *Id.* at 1136 n.2. Of course, this is the exact understanding of the phrase advanced by Judge King in her dissent in this case. App. 45a.

Ninth Circuit decisions refer to "abuse of discretion" but do not review the substance of the district court's treatment of the § 1404(a) factors:

> We decline to issue the writ when it appears from a well-reasoned holding by the trial judge that he has considered the issues listed in 1404(a) and has made his decision accordingly. It is not our function to substitute our judgment for that of the judge most familiar with the problem.

Kasey, 408 F.2d at 20. "This has continued to be the rule applied in the Ninth Circuit, and in no instance has it led to the issuance of the writ." 15 Wright, Miller & Cooper, § 3855 at 348; *see also, e.g.*, *Young Prop. Corp. v. United Equity Corp.*, 534 F.2d 847, 854 (9th Cir.), *cert. denied*, 429 U.S. 830 (1976); *A.J. Indus., Inc. v. U.S. Dist Ct.*, 503 F.2d 384, 389 (9th Cir. 1974).

By contrast, the Sixth, Seventh, Eleventh and District of Columbia Circuits appear to take the Fifth Circuit's approach. The Seventh Circuit inquires whether the district court decision is "patently erroneous," *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003), whether the judge "clearly abused his discretion," *Butterick Co. v. Will*, 316 F.2d 111, 112 (7th Cir. 1963), or whether the transfer is "so clearly erroneous that it amounted to an abuse of discretion." *Chicago, Rock Island & Pac. R.R. v. Igoe*, 220 F.2d 299,

305 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955). In *Igoe*, the Seventh Circuit conducted a detailed review of the facts at issue and granted the writ to reverse denial of a § 1404(a) motion because the trial judge struck the wrong balance. *See id.* at 305. Judge Finnegan dissented, remarking that the court of appeals had "no business balancing the conveniences of the parties." *Id.* at 307.

The District of Columbia Circuit has specifically set forth its view that, in § 1404(a) cases at least, mandamus is available to do more than simply "confine an inferior court to a lawful exercise of its prescribed jurisdiction." *In re Sealed Case*, 141 F.3d 337, 340 (D.C. Cir. 1998) (citations and quotations omitted). Rather, in that court's view, the writ also exists "to prevent abuses of a district court's authority to transfer a case." *Id.; accord Ukiah Adventist Hosp. v. F.T.C.*, 981 F.2d 543, 548 (D.C. Cir. 1992), *cert. denied*, 510 U.S. 825 (1993). Similarly, the Sixth and Eleventh Circuits employ the "abuse of discretion" standard. *See, e.g., Roofing & Sheet Metal Serv.*, 689 F.2d at 988; *Penn. R.R. Co. v. Connell*, 295 F.2d 32 (6th Cir. 1961).

Finally, some courts of appeals have approached mandamus in the § 1404(a) context so inconsistently that their current stances are hard to discern. *See* 15 Wright, Miller & Cooper, § 3855 at 332 (noting intra-circuit conflicts). The Second Circuit initially indicated a willingness to review district courts' transfer decisions and their consideration of the various factors for abuse of discretion, though Judges Swan and Friendly dissented from this approach. *See A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439 (2d Cir. 1966); *Ford Motor Co. v. Ryan*, 182 F.2d 329 (2d Cir.), *cert. denied*,

340 U.S. 851 (1950). The court also granted the writ when the district court failed to consider any of the § 1404(a) factors at all. *See In re Warrick*, 70 F.3d 736, 740-41 (2d Cir. 1995). But in *Application of Amarnick*, 558 F.2d 110 (2d Cir. 1977), the court quoted *Banker's Life* and emphasized that "clear abuses[s] of the district court's power" were the only circumstances justifying reversal of a transfer decision. *See id.* at 112-13.

Similarly, three Eighth Circuit decisions employed a "clear abuse of discretion" standard or something similar. *See Toro Co. v. Alsop*, 565 F.2d 998, 1001 (8th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *U.S. v. Lord*, 542 F.2d 719, 724 (8th Cir. 1976); *McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361 (8th Cir. 1965). A fourth, however, cited *Will* for the rule that the writ should issue when there are "exceptional circumstances amounting to a judicial usurpation of power and when a district court has exceeded the sphere of its discretionary power." *Caleshu v. Wangelin*, 549 F.2d 93, 96 (8th Cir. 1977) (quoting *Will*, 389 U.S. at 95 and 104) (internal quotations omitted).

In the Tenth Circuit, an early decision indicated that review would be had for "clear abuse of discretion" and, in refusing the writ, closely examined the factual bases and affidavits supporting and opposing transfer. *See Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 147-48 (10th Cir. 1967). Later decisions have taken an approach similar to the Ninth Circuit, however, by focusing simply on whether the district court examined the traditional factors, not the substance of the trial judge's analysis and balancing. *See, e.g., Hustler Magazine*, 790 F.2d at 70-72; *In re Dalton*, 733 F.2d 710, 717-18 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1185 (1985).

In sum, over the years the courts of appeals have arrived at sharply disparate views of the scope of mandamus review of § 1404(a) decisions. Some have faithfully followed this Court's mandamus jurisprudence and eschewed reweighing the relevant factors, whether this review is characterized as looking for one or another species of abuse of discretion. Other courts are willing to use the All Writs Act to rebalance the factors and intervene before final judgment in order to determine the forum. This Court should now resolve the persistent and repeatedly noted confusion in this area.

C. The Courts of Appeals Further Disagree on the Adequacy of Appeal as a Remedy for Erroneous Transfer Rulings

An additional, subsidiary conflict apparent here concerns whether parties who lose transfer motions have an adequate remedy through post-judgment appeal. *See* MacWilliam, 28 A.L.R. Fed. 2d at 330 (noting conflict). The absence of such a remedy is one of the prerequisites for issuing the writ. *See Cheney*, 542 U.S. at 380-81.

In this case, the court of appeals held that appeal after an adverse final judgment provides insufficient redress for losing a transfer motion because the losing side will not be able to show prejudice and will already have suffered the inconvenience. App. 29a. Some other courts of appeals agree. *See, e.g., Nat'l Presto Indus.*, 347 F.3d at 663; *Filmline (Cross-Country) Productions, Inc. v. United Artists Corp.*, 865 F.2d 513, 520 (2d Cir. 1989); *Sunshine Beauty Supplies, Inc. v. U.S. Dist. Ct.*, 872 F.2d 310, 311 (9th Cir. 1989).

Several courts, however, recognize that post-judgment appeal is fully available to correct erroneous transfer decisions. *See, e.g., Petition of Int'l Precious Metals Corp.*, 917 F.2d 792, 793 (4th Cir. 1990); *Middlebrooks v. Smith*, 735 F.2d 431, 433 (11th Cir. 1984); *Dalton*, 733 F.2d at 717; *In re GAF Corp.*, 416 F.2d 1252 (1st Cir. 1969); MacWilliam, 28 A.L.R. Fed. 2d at 354-60 (collecting cases holding appeal adequate).

For example, the Fourth Circuit's view that § 1404(a) rulings must await appeal in the normal course is based on this Court's decision in *Lauro Lines S.R.L. v. Chasser* that denial of a motion to dismiss based on a forum selection clause requiring litigation in Italy was not interlocutorily appealable under the collateral order doctrine. *See Int'l Precious Metals*, 917 F.2d at 793 (citing 490 U.S. 495, 498-501 (1989)). In *Lauro Lines*, where the defendant had to submit to trial in the wrong country let alone a supposedly inconvenient federal venue, the Court still "declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order." 490 U.S. at 499. *Banker's Life* similarly holds that erroneous decisions under § 1406(a) are "reviewable on appeal after final judgment . . . even though hardship may result from delay and perhaps unnecessary trial." 346 U.S. at 382-83; *accord Roche*, 319 U.S. at 28. The dissent in this case made the same point: "That such an appeal may have limited success due to the harmless error rule, Fed. R. Civ. P. 61, does not mean – here or anywhere else that I know of – that direct appeal is 'unavailable.'" App. 40a. This aspect of the uncertainty surrounding mandamus review in § 1404(a) cases also merits resolution by this Court.

II. The Court Should Grant the Petition Because Limited Mandamus Review of § 1404(a) Rulings Promotes Efficiency, Safeguards District Court Discretion and Avoids Piecemeal Appeals

"[T]he transfer motion has become a common, almost reflexive defendant response to a lawsuit." Kelner, *supra* at 13, at 615. It is filed "almost as a matter of course when some colorable argument exists" in support. David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 464 (1990). The Administrative Office of United States Courts does not publish statistics on § 1404(a) motions or subsequent mandamus petitions, but one researcher determined that the district courts transferred approximately 4,000 cases annually as of 1988-89. *See id.* at 446 n. 11. The number has likely risen along with the overall increase in federal filings, and this figure does not reflect denials of § 1404(a) motions, which are presumably more numerous than orders granting them. "Because § 1404(a) embraces so many different factors as relevant to a transfer motion, defendants almost always have grounds to argue in good faith that transfer is appropriate, if not desirable." Kelner, *supra* at 13, at 615.

For the same reason, resourceful counsel will not hesitate to seek a second bite at the apple from the court of appeals if the § 1404(a) factors are to be rebalanced under the guise of testing for abuse of discretion. As Judge Friendly put it, noting that the Second Circuit had never issued the writ in a § 1404(a) case: "But even so dismal a record naturally does not prevent counsel from accepting our invitation, whether because in the

heat of battle they have persuaded themselves of the merits of their cause or because, however slight their chance of success, they welcome the delay a mandamus petition will cause." *A. Olinick & Sons*, 365 F.2d at 446-47 (Friendly, J., dissenting). Commentators are already predicting the decision below will inevitably increase the number of petitions seeking the writ.[7] Given the frequency of § 1404(a) litigation, the Court should grant certiorari to clarify the role of the courts of appeals in the process.

There is a high systemic cost to broadening interlocutory review of transfer decisions. Section 1404(a) was enacted to further convenience and efficiency, speed resolution on the merits and "prevent the waste of time, energy and money." *Van Dusen*, 376 U.S. at 616 (quotations omitted). But greater resort to mandamus review "will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried." *Modarelli*, 196 F.2d at 1011-12.

Indeed, as Judge King's dissent makes clear, this case is a "painful and ironic example" of how vigorously sought and willingly granted mandamus review deferred discovery for months, cancelled a trial setting, and generally

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7. *See* Mary Alice Robbins, *5th Circuit Grants Mandamus on Venue Dispute in Eastern District*, 24 TEX. LAWYER 1, 16 (October 20, 2008); Sutherland Legal Alert, *Fifth Circuit Ruling May Aid Defendants with Transfer of Venue Requests in Eastern District (and Other Districts) of Texas*, October 16, 2008, at www.sutherland.com.

extended the litigation while the defendant not only petitioned for mandamus but moved for rehearing before finally securing the objective of an appellate determination of venue. App 42a. More generally, cases awaiting mandamus review in the court of appeals continue to clog the district court's docket while witness memories fade, other motions sit undecided, and the litigants incur greater cost – all so a second layer of the judiciary can take its own stab at the inherently malleable task of § 1404(a) balancing and debate the significance of, *e.g.*, an extra fifty-five miles.

Aside from the added delay and inefficiency, appellate reappraisal of the § 1404(a) factors undermines the wide discretion given district judges by Congress when it enacted § 1404(a). The Fifth Circuit itself once recognized that "[t]he determination whether the circumstances warrant transfer of venue is peculiarly one for the exercise of judgment by those in daily proximity to the[] delicate problems of trial litigation." *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966). This forbearance was "borne of basic notions of institutional order and upon the common-sense realization that the system works best when able district judges, as here, are left to manage their own dockets." *Cragar Indus.*, 706 F.2d at 506. The Fifth Circuit's current approach to mandamus upends the "institutional order" it once rightly prized.

Nor is the problem ameliorated by supposedly limiting review to instances of *clear* abuse of discretion rather than *mere* abuse of discretion. "I cannot think the restriction here imposed – that we will issue the writ not for simple but only for 'clear-cut' abuse of discretion – will help much," Judge Friendly wisely cautioned. *A. Olinick & Sons*, 365 F.2d at 446-47 (Friendly, J.,

dissenting). "A lawyer who is ready to say that a district judge has abused his discretion," he continued, "will not boggle over the adjective, and application of the standards constantly being proliferated for review of orders of district judges – error, clear error, abuse of discretion, now clear-cut abuse of discretion – requires a mind more sensitive than mine." *Id.* at 447; *accord Kasey*, 408 F.2d at 20 ("Such a nebulous criterion [abuse of discretion] serves neither the trial judge who must abide by it nor the litigant who must frame his appeal in terms of it").

"Clear abuse of discretion" and "patently erroneous result" are terms so meaningless and elastic that they will inevitably justify interlocutory intervention whenever appellate judges, like the majority here, cannot help themselves and think it essential that they plunge in to make sure the case is tried in their preferred forum. More and more venue choices will be made by appellate panels rather than the trial judges closest to the facts and circumstances of each case.

Finally and perhaps most important, the approach to mandamus taken by the Fifth Circuit and other similarly inclined courts eats away at Congress's command that appeal be limited to final judgments. *See* 28 U.S.C. § 1291. Congress has proscribed piecemeal review since the first Judiciary Act of 1789, *see Allied Chemical*, 449 U.S. at 35, and this Court has long recognized the many "salutary purposes" served by vigilantly enforcing the final judgment rule, including preserving the "independence of the district judge" and avoiding "the harassment and cost of a succession of separate appeals from the various rulings to which a

litigation may give rise." *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203-04 (1999) (quotations and citations omitted). "A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation," however, "would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." *Allied Chemical*, 449 U.S. at 35 (quotations omitted). As the Ninth Circuit recognized, it is quite simply "contradictory to acknowledge . . . that direct appeal of a holding on a 1404(a) motion is not possible and then to allow what amounts to a full scale appeal through a mandamus proceeding." *Kasey*, 408 F.2d at 19.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED OCTOBER 10, 2008

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-40058

In re: VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation; Volkswagen AG, a foreign corporation organized under the laws of Germany,

Petitioners.

Petition for Writ of Mandamus
to the United States District Court
for the Eastern District of Texas

Before JONES, Chief Judge, and KING, JOLLY, DAVIS, SMITH, WIENER, BARKSDALE, GARZA, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, and HAYNES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge, joined by EDITH H. JONES, Chief Judge, and JERRY E. SMITH, RHESA H. BARKSDALE, EMILIO M. GARZA, EDITH BROWN CLEMENT, OWEN, JENNIFER W. ELROD, SOUTHWICK and HAYNES, Circuit Judges:

The overarching question before the *en banc* Court is whether a writ of mandamus should issue directing the transfer of this case from the Marshall Division of

the Eastern District of Texas—which has no connection to the parties, the witnesses, or the facts of this case—to the Dallas Division of the Northern District of Texas—which has extensive connections to the parties, the witnesses, and the facts of this case. We grant the petition and direct the district court to transfer this case to the Dallas Division.

I.

A.

On the morning of May 21, 2005, a Volkswagen Golf automobile traveling on a freeway in Dallas, Texas, was struck from behind and propelled rear-first into a flat-bed trailer parked on the shoulder of the freeway. Ruth Singleton was driving the Volkswagen Golf. Richard Singleton was a passenger. And Mariana Singleton, Richard and Ruth Singleton's seven-year-old granddaughter, was also a passenger. Richard Singleton was seriously injured in the accident. Mariana Singleton was also seriously injured in the accident, and she later died as a result of her injuries.

Richard Singleton, Ruth Singleton, and Amy Singleton (Mariana's mother) filed suit against Volkswagen AG and Volkswagen of America, Inc., in the Marshall Division of the Eastern District of Texas, alleging that design defects in the Volkswagen Golf caused Richard's injuries and Mariana's death.

In response to the Singletons' suit, Volkswagen filed a third-party complaint against the driver of the automobile that struck the Singletons, alleging that the Singletons had the ability to sue him but did not and that his negligence was the only proximate cause of the damages.

B.

Pursuant to 28 U.S.C. § 1404(a),[1] Volkswagen moved to transfer venue to the Dallas Division. Volkswagen asserted that a transfer was warranted as the Volkswagen Golf was purchased in Dallas County, Texas; the accident occurred on a freeway in Dallas, Texas; Dallas residents witnessed the accident; Dallas police and paramedics responded and took action; a Dallas doctor performed the autopsy; the third-party defendant lives in Dallas County, Texas; none of the plaintiffs live in the Marshall Division; no known party or non-party witness lives in the Marshall Division; no known source of proof is located in the Marshall Division; and none of the facts giving rise to this suit occurred in the Marshall Division. These facts are undisputed.

The district court denied Volkswagen's transfer motion. *Singleton v. Volkswagen of Am., Inc.*, 2006 WL 2634768 (E.D.Tex. Sept. 12, 2006). Volkswagen then filed a motion for reconsideration, arguing that the district

1. Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

court gave inordinate weight to the plaintiffs' choice of venue[2] and, to state Volkswagen's arguments generally, that the district court failed meaningfully to weigh the venue transfer factors. The district court also denied Volkswagen's motion for reconsideration, and for the same reasons presented in its denial of Volkswagen's transfer motion. *Singleton v. Volkswagen of Am., Inc.*, 2006 WL 3526693 (E.D.Tex. Dec. 7, 2006).

C.

Volkswagen then petitioned this Court for a writ of mandamus. In a *per curiam* opinion, a divided panel of this Court denied the petition and declined to issue a writ. *In re Volkswagen of Am. Inc.*, 223 Fed.Appx. 305 (5th Cir.2007). The panel majority held that the district court did not clearly abuse its discretion in denying Volkswagen's transfer motion. Judge Garza wrote a dissenting opinion and in it noted that "[t]he only connection between this case and the Eastern District of Texas is plaintiffs' choice to file there; *all* other factors relevant to transfer of venue weigh overwhelmingly in favor of the Northern District of Texas." *Id.* at 307 (Garza, J., dissenting).

2. The parties have referenced the deference given to a "plaintiff's choice of forum" in venue transfer cases. However, a transfer between federal courts pursuant to § 1404(a) is not a transfer between forums; it is a transfer between venues. Thus, in venue transfer cases, deference given to a plaintiff's initial choice is deference given to a plaintiff's choice of venue.

Volkswagen then filed a petition for rehearing *en banc*. The original panel interpreted the petition for rehearing *en banc* as a petition for panel rehearing, granted it, withdrew its decision, and directed the Clerk's Office to schedule the petition for oral argument. A second panel of this Court then heard oral argument on the issues raised for review. The second panel granted Volkswagen's petition and issued a writ directing the district court to transfer this case to the Dallas Division. *In re Volkswagen of Am., Inc.*, 506 F.3d 376 (5th Cir.2007).

The Singletons then filed a petition for rehearing *en banc*, which the Court granted. *In re Volkswagen of Am., Inc.*, 517 F.3d 785 (5th Cir.2008).

II.

In this opinion, we will first address whether mandamus is an appropriate means to test a district court's ruling on a venue transfer motion. Citing our precedents and the precedents of the other courts of appeals, we hold that mandamus is appropriate when there is a clear abuse of discretion. We note that the Supreme Court has set out three requirements for the issuance of the writ. Of these, we address first whether Volkswagen has established a clear and indisputable right to the writ. We begin by observing that the only factor that favors keeping the case in Marshall, Texas, is the plaintiffs' choice of venue. We discuss this privilege granted under 28 U.S.C. § 1391, and how the privilege is tempered by the considerations of inconvenience

under § 1404(a). We demonstrate that a plaintiff's choice of forum under the *forum non conveniens* doctrine is weightier than a plaintiff's choice of venue under § 1404(a) because the former involves the outright dismissal of a case, and the latter involves only a transfer of venue within the same federal forum. After determining the correct standards to apply in the § 1404(a) analysis, we then consider the showing of inconvenience that Volkswagen has made. We review the district court's ruling and conclude that the district court abused its discretion in denying the transfer. But that does not resolve the case. The question next becomes whether the district court's ruling was a clear abuse of discretion that qualifies for mandamus relief. Concluding that the district court gave undue weight to the plaintiffs' choice of venue, ignored our precedents, misapplied the law, and misapprehended the relevant facts, we hold that the district court reached a patently erroneous result and clearly abused its discretion in denying the transfer. Further finding that the showing satisfies the other requirements of the Supreme Court for mandamus, we conclude that a writ is appropriate under the circumstances of this case. We now begin this discussion.

III.

Because some suggestion is made that mandamus is an inappropriate means to test the district court's discretion in ruling on venue transfers, we will first turn our attention to this subject.

We—and the other courts of appeals that have considered the matter—have expressly "recognized the availability of mandamus as a limited means to test the district court's discretion in issuing transfer orders." *In re Horseshoe Entm't*, 337 F.3d 429, 432 (5th Cir.2003).[3] There can be no doubt therefore that mandamus is an appropriate means of testing a district court's § 1404(a) ruling.

Although the Supreme Court has never decided mandamus in the context of § 1404(a), the Supreme Court holds that mandamus is an appropriate remedy for "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (citations and internal quotation marks omitted). Thus, the specific standard that we apply here is that mandamus will be granted upon a determination that there has been a clear abuse of discretion.

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3. *See, e.g., In re Sealed Case*, 141 F.3d 337, 340 (D.C.Cir.1998); *In re Josephson*, 218 F.2d 174, 183 (1st Cir.1954), *abrogated on other grounds by In re Union Leader Corp.*, 292 F.2d 381, 383 (1st Cir.1961); *In re Warrick*, 70 F.3d 736, 740 (2d Cir.1995); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir.2002); *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir.1984); *Lemon v. Druffel*, 253 F.2d 680, 685 (6th Cir.1958); *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir.2003); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir.1977); *Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16, 19-20 (9th Cir.1969); *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 692 (10th Cir.1965); *In re Ricoh Corp.*, 870 F.2d 570, 573 n. 5 (11th Cir.1989).

The Supreme Court also has said, however, that courts reviewing petitions for mandamus "must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Will v. United States,* 389 U.S. 90, 98 n. 6, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); *see Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 382-83, 74 S.Ct. 145, 98 L.Ed. 106 (1953) (rejecting reasoning that implied that "every interlocutory order which is wrong might be reviewed under the All Writs Act"). This admonition distinguishes the standard of our appellate review from that of our mandamus review. The admonition warns that we are not to issue a writ to correct a mere abuse of discretion, even though such might be reversible on a normal appeal. The inverse of the admonition, of course, is that a writ is appropriate to correct a clear abuse of discretion.

Admittedly, the distinction between an abuse of discretion and a clear abuse of discretion cannot be sharply defined for all cases. As a general matter, a court's exercise of its discretion is not unbounded; that is, a court must exercise its discretion within the bounds set by relevant statutes and relevant, binding precedents.[4] "A district court abuses its discretion if it:

4. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 416, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (noting that a decision calling for the exercise of discretion "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate

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review"); *United States v. Taylor*, 487 U.S. 326, 336, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988) ("Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise. Had Congress merely committed the choice of remedy to the discretion of district courts, without specifying factors to be considered, a district court would be expected to consider 'all relevant public and private interest factors,' and to balance those factors reasonably." (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981))); *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir.1993) ("Here, as generally, the judicial recognition of such factors as guides to a proper exercise of discretion operates to impose legal constraints on its exercise by trial courts and in turn to guide our review—to which we now turn."); *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir.1984) ("That is, when we say that a decision is discretionary, or that a district court has discretion to grant or deny a motion, we do not mean that the district court may do whatever pleases it. The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law. An abuse of discretion, on the other hand, can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment."); *Gurmankin v. Costanzo*, 626 F.2d 1115, 1119-20 (3d Cir.1980) ("Meaningful appellate review of the exercise of discretion requires consideration of the basis on which the trial court acted. If the factors considered do not accord with those required by the policy underlying the substantive right or if the weight given to those factors is not consistent with that necessary to effectuate that policy, then
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(1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir.2003) (citation omitted). On mandamus review, we review for these types of errors, but we only will grant mandamus relief when such errors produce a patently erroneous result.

Thus, as to the suggestion that mandamus is an inappropriate means to test the district court's discretion in ruling on venue transfers, the precedents are clear that mandamus is entirely appropriate to review for an abuse of discretion that clearly exceeds the bounds of judicial discretion.[5]

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the reviewing tribunal has an obligation to require the exercise of discretion in accordance with 'what is right and equitable under the circumstances and the law.' " (quoting *Langnes v. Green*, 282 U.S. 531, 541, 51 S.Ct. 243, 75 L.Ed. 520 (1931))); *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 193 (4th Cir.1977) ("A judge's discretion is not boundless and must be exercised within the applicable rules of law or equity." (citing *Peterson v. John Hancock Mut. Life Ins. Co.*, 116 F.2d 148, 151 (8th Cir.1971))).

5. *See, e.g., In re Estelle*, 516 F.2d 480, 483 (5th Cir.1975) (noting that mandamus is appropriate "to confine an inferior court to a lawful exercise of its prescribed jurisdiction" and "to confine the lower court to the sphere of its discretionary power" (internal quotation marks and citations omitted)); *see also In re Sandahl*, 980 F.2d 1118, 1121-22 (7th Cir.1992) (granting petition for writ of mandamus to vacate "patently erroneous" order); *In re BellSouth Corp.*, 334 F.3d 941, 954 (11th Cir.2003) (noting that "mandamus should ordinarily lie . . . only if the district court order is patently erroneous").

Appendix A

IV.

Because the writ is an extraordinary remedy, the Supreme Court has established three requirements that must be met before a writ may issue: (1) "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process"; (2) "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81, 124 S.Ct. 2576 (alterations in original) (citations and internal quotation marks omitted). "These hurdles, however demanding, are not insuperable." *Id.* at 381, 124 S.Ct. 2576.

Although, at the moment, we will not address these requirements in the context of and in the order enumerated in *Cheney*, we shall tie it all together further into the opinion. We shall first address the second requirement because it captures the essence of the disputed issue presented in this petition.

A.

The second requirement is that the petitioner must have a clear and indisputable right to issuance of the writ. If the district court clearly abused its discretion

(the standard enunciated by the Supreme Court in *Cheney*) in denying Volkswagen's transfer motion, then Volkswagen's right to issuance of the writ is necessarily clear and indisputable. *In re U.S. Dept. of Homeland Sec.*, 459 F.3d 565, 571 (5th Cir.2006) (Dennis, J., concurring) (noting that petitioner must show "that its right to issuance of the writ is 'clear and indisputable' by demonstrating that there has been a 'usurpation of judicial power' or a 'clear abuse of discretion' "); *In re Steinhardt Partners*, 9 F.3d 230, 233 (2d Cir.1993) (same); *In re Wilson*, 451 F.3d 161, 169 (3d Cir.2006) (same); *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1184 (10th Cir.2006) (same).

There can be no question but that the district courts have "broad discretion in deciding whether to order a transfer." *Balawajder v. Scott*, 160 F.3d 1066, 1067 (5th Cir.1998) (quoting *Caldwell v. Palmetto State Sav. Bank*, 811 F.2d 916, 919 (5th Cir.1987)). But this discretion has limitations imposed by the text of § 1404(a) and by the precedents of the Supreme Court and of this Court that interpret and apply the text of § 1404(a).[6]

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6. Judge Friendly noted that "[e]ven when a statute or rule expressly confers discretion or uses the verb 'may' or some similar locution, there is still the implicit command that the judge shall exercise his power reasonably." Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 765 (1982). Judge Friendly also said, "When the 'you shall do it unless' type of formulation is not a realistic option because of the multiplicity of considerations bearing upon an issue, it is still useful for legislators or appellate courts to specify the factors

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Appendix A

To determine whether a district court clearly abused its discretion in ruling on a transfer motion, some petitions for mandamus relief that are presented to us require that we "review[ ] carefully the circumstances presented to and the decision making process" of the district court. *In re Horseshoe Entm't,* 337 F.3d at 432.[7]

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that the trial judge is to consider. This has long been done, for example, with respect to the subject with which we began, dismissal on the ground of *forum non conveniens,* and its cousin, transfer under 28 U.S.C. section 1404. . . . If [the judge] has faithfully checked off *and correctly decided each item,* his determination should usually be allowed to stand. *Per contra,* if he has neglected *or misapprehended items* that would operate in favor of the losing party, an appellate court will have sound basis for finding that discretion was abused." *Id.* at 769-70 (emphasis added).

7. When reviewing petitions for mandamus, courts of appeals often consider the venue transfer factors (or those factors applicable in other contexts) and the relevant facts to determine whether a district court clearly abused its discretion in granting or denying transfer (or the relief requested in other contexts). *See, e.g., In re Tripati,* 836 F.2d 1406, 1407 (D.C.Cir.1988); *A. Olinick & Sons v. Dempster Bros., Inc.,* 365 F.2d 439, 444-45 (2d Cir.1966); *In re Ralston Purina Co.,* 726 F.2d 1002, 1006 (4th Cir.1984); *ACF Indus., Inc. v. Guinn,* 384 F.2d 15, 19-20 (5th Cir.1967); *In re Oswalt,* 607 F.2d 645, 647 (5th Cir.1979); *In re McDonnell-Douglas Corp.,* 647 F.2d 515, 517 (5th Cir. Unit A May 1981); *Castanho v. Jackson Marine, Inc.,* 650 F.2d 546, 550 (5th Cir. Unit A June 1981); *In re First S. Sav. Ass'n,* 820 F.2d 700, 709 (5th Cir.1987); *In re Ramu Corp.,* 903 F.2d 312, 319 (5th Cir.1990); *In re Horseshoe Entm't,* 337 F.3d at

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Others can be summarily decided. But—and we stress-in no case will we replace a district court's exercise of discretion with our own; we review only for clear abuses of discretion that produce patently erroneous results. We therefore turn to examine the district court's exercise of its discretion in denying Volkswagen's transfer motion.

1.

The preliminary question under § 1404(a) is whether a civil action "might have been brought" in the destination venue. Volkswagen seeks to transfer this case to the Dallas Division of the Northern District of Texas. All agree that this civil action originally could have been filed in the Dallas Division. *See* 28 U.S.C. § 1391.

2.

Beyond this preliminary and undisputed question, the parties sharply disagree. The first disputed issue is

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432; *Chicago, Rock Island & Pac. R.R. v. Igoe*, 220 F.2d 299, 305 (7th Cir.1955); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295-1304 (7th Cir.1995); *Toro Co. v. Alsop*, 565 F.2d 998, 999-1000 (8th Cir.1977); *see also McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361, 363 (8th Cir.1965) ("Unless it is made clearly to appear that the facts and circumstances are without any basis for a judgment of discretion, the appellate court will not proceed further to examine the district court's action in the situation. If the facts and circumstances are rationally capable of providing reasons for what the district court has done, its judgment based on those reasons will not be reviewed.").

whether the district court, by applying the *forum non conveniens* dismissal standard, erred by giving inordinate weight to the plaintiffs' choice of venue. We have noted earlier that there is nothing that ties this case to the Marshall Division except plaintiffs' choice of venue. It has indeed been suggested that this statutorily granted choice is inviolable. A principal disputed question, then, is what role does a plaintiff's choice of venue have in the venue transfer analysis. We now turn to address this question.

(a)

When no special, restrictive venue statute applies, the general venue statute, 28 U.S.C. § 1391, controls a plaintiff's choice of venue. Under § 1391(a)(1), a diversity action may be brought in "a judicial district where any defendant resides, if all defendants reside in the same State." Under § 1391(c), when a suit is filed in a multi-district state, like Texas, a corporation is "deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State." Because large corporations, like Volkswagen, often have sufficient contacts to satisfy the requirement of § 1391(c) for most, if not all, federal venues, the general venue statute "has the effect of nearly eliminating venue restrictions in suits against corporations." 14D Wright, Miller & Cooper, *Federal Practice & Procedure* § 3802 (3d ed.2007) (noting also that, because of the liberal, general venue statute, "many venue disputes now are litigated as motions to transfer venue under Section 1404 of Title 28").

Congress, however, has tempered the effects of this general venue statute by enacting the venue transfer statute, 28 U.S.C. § 1404. The underlying premise of § 1404(a) is that courts should prevent plaintiffs from abusing their privilege under § 1391 by subjecting defendants to venues that are inconvenient under the terms of § 1404(a). *See Norwood v. Kirkpatrick*, 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789 (1955); *cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) ("[The general venue] statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts. . . . But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment."). Thus, while a plaintiff has the privilege of filing his claims in any judicial division appropriate under the general venue statute, § 1404(a) tempers the effects of the exercise of this privilege.

(b)

With this understanding of the competing statutory interests, we turn to the legal precedents. We first turn to *Gilbert* because of its historic and precedential importance to § 1404(a), even today.

In 1947, in *Gilbert*, the Supreme Court firmly established in the federal courts the common-law doctrine of *forum non conveniens*. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (noting that "the doctrine of *forum non conveniens* was not fully crystallized" until *Gilbert*). The essence of the *forum non conveniens* doctrine is that a

court may decline jurisdiction and may actually dismiss a case, even when the case is properly before the court, if the case more conveniently could be tried in another forum. *Gilbert*, 330 U.S. at 507, 67 S.Ct. 839.

Shortly after the *Gilbert* decision, in 1948, the venue transfer statute became effective. The essential difference between the *forum non conveniens* doctrine and § 1404(a) is that under § 1404(a) a court does not have authority to dismiss the case; the remedy under the statute is simply a transfer of the case within the federal system to another federal venue more convenient to the parties, the witnesses, and the trial of the case. Thus, as the Supreme Court has said, "Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience." *Norwood*, 349 U.S. at 32, 75 S.Ct. 544.[8]

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8. The district courts are permitted to grant transfers upon a lesser showing of inconvenience under § 1404(a) because § 1404(a) venue transfers do not have the serious consequences of *forum non conveniens* dismissals. *See Norwood*, 349 U.S. at 31, 75 S.Ct. 544 (" 'The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely. (Cont'd)

That § 1404(a) venue transfers may be granted "upon a lesser showing of inconvenience" than *forum non conveniens* dismissals, however, does not imply "that the relevant factors [from the *forum non conveniens* context] have changed or that the plaintiff's choice of [venue] is not to be considered." *Id.*[9] But it does imply that the burden that a moving party must meet to justify a venue transfer is less demanding than that a moving party must meet to warrant a *forum non conveniens* dismissal. And we have recognized as much, noting that the "heavy *burden* traditionally imposed upon defendants by the *forum non conveniens* doctrine—dismissal permitted only in favor of a substantially more convenient alternative—was dropped in the § 1404(a) context. In order to obtain a new federal [venue], the statute requires only that the transfer be

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through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. '" (quoting *All States Freight v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir.1952))); *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) (holding that a "change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms"); *Ferens v. John Deere Co.*, 494 U.S. 516, 519, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990) (applying the *Van Dusen* rule when a plaintiff moves for transfer).

9. Indeed, we have adopted the *Gilbert* factors, which were enunciated in *Gilbert* for determining the *forum non conveniens* question, for determining the § 1404(a) venue transfer question. *See Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir.1963).

'[f]or the convenience of the parties, in the interest of justice.' " *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1247 (5th Cir.1983) (emphasis and first alteration added); *see Piper Aircraft*, 454 U.S. at 254, 102 S.Ct. 252 (noting the "relaxed standards for transfer").[10] Thus,

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10. We have noted that a plaintiff's choice of venue is to be treated "as a burden of proof question." *Humble Oil*, 321 F.2d at 56; *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir.1966) ("At the very least, the plaintiff's privilege of choosing venue places the burden on the defendant to demonstrate why the [venue] should be changed."). The Singletons, however, argue that a plaintiff's choice of venue should be considered as an independent factor within the venue transfer analysis and argue that *Norwood*, because it indicated that the factors have not changed from the *forum non conveniens* context, requires this result. And, indeed, the district court considered the plaintiffs' choice of venue as an independent factor within the venue transfer analysis. A plaintiff's choice of forum, however, is not an independent factor within the *forum non conveniens* or the § 1404(a) analysis. In fact, the Supreme Court has indicated that a plaintiff's choice of forum corresponds to the burden that a moving party must meet: "A defendant invoking *forum non conveniens* ordinarily bears a heavy *burden* in opposing the plaintiff's chosen forum." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 127 S.Ct. 1184, 1191, 167 L.Ed.2d 15 (2007) (emphasis added); *see also Gilbert*, 330 U.S. at 507, 67 S.Ct. 839 (indicating the convenience factors and then noting "[b]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"). Although a plaintiff's choice of venue is not a distinct factor in the venue transfer analysis, it is nonetheless taken into account as it places a significant burden on the movant to show good cause for the transfer. Thus, our analysis directly manifests the importance that we must give to the plaintiff's choice.

the district court, in requiring Volkswagen to show that the § 1404(a) factors must substantially outweigh the plaintiffs' choice of venue, erred by applying the stricter *forum non conveniens* dismissal standard and thus giving inordinate weight to the plaintiffs' choice of venue.

As to the appropriate standard, in *Humble Oil* we noted that "the avoidance of dismissal through § 1404(a) lessens the weight to be given" to the plaintiff's choice of venue and that, consequently, "he who seeks the transfer must show good cause." 321 F.2d at 56. This "good cause" burden reflects the appropriate deference to which the plaintiff's choice of venue is entitled. When viewed in the context of § 1404(a), to show good cause means that a moving party, in order to support its claim for a transfer, must satisfy the statutory requirements and clearly demonstrate that a transfer is "[f]or the convenience of parties and witnesses, in the interest of justice." Thus, when the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff's choice should be respected. When the movant demonstrates that the transferee venue is clearly more convenient, however, it has shown good cause and the district court should therefore grant the transfer.[11]

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11. We emphasize that this is a different proposition from whether mandamus lies to address the district court's ruling, because as we have earlier noted, mandamus does not reach all erroneous rulings of the district court.

3.

We thus turn to examine the showing that Volkswagen made under § 1404(a) and the district court's response.

As noted above, we have adopted the private and public interest factors first enunciated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), a *forum non conveniens* case, as appropriate for the determination of whether a § 1404(a) venue transfer is for the convenience of parties and witnesses and in the interest of justice. *See Humble Oil*, 321 F.2d at 56.

The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir.2004) [hereinafter *In re Volkswagen I*] (citing *Piper Aircraft*, 454 U.S. at 241 n. 6, 102 S.Ct. 252). The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Id.*

Although the *Gilbert* factors are appropriate for most transfer cases, they are not necessarily exhaustive or exclusive. Moreover, we have noted that "none . . . can be said to be of dispositive weight." *Action Indus., Inc. v. U.S. Fid. & Guar. Corp.*, 358 F.3d 337, 340 (5th Cir.2004).

(a)

Before the district court, Volkswagen asserted that a transfer was warranted because: (1) the relative ease of access to sources of proof favors transfer as all of the documents and physical evidence relating to the accident are located in the Dallas Division, as is the collision site; (2) the availability of compulsory process favors transfer as the Marshall Division does not have absolute subpoena power over the non-party witnesses; (3) the cost of attendance for willing witnesses factor favors transfer as the Dallas Division is more convenient for all relevant witnesses; and (4) the local interest in having localized interests decided at home favors transfer as the Volkswagen Golf was purchased in Dallas County, Texas; the accident occurred on a freeway in Dallas, Texas; Dallas residents witnessed the accident; Dallas police and paramedics responded and took action; a Dallas doctor performed the autopsy; the third-party defendant lives in Dallas County, Texas; none of the plaintiffs live in the Marshall Division; no known party or non-party witness lives in the Marshall Division; no known source of proof is located in the Marshall Division; and none of the facts giving rise to this suit occurred in the Marshall Division.

(b)

Applying the *Gilbert* factors, however, the district court concluded that: (1) the relative ease of access to sources of proof is neutral because of advances in copying technology and information storage; (2) the availability of compulsory process is neutral because, despite its lack of absolute subpoena power, the district court could deny any motion to quash and ultimately compel the attendance of third-party witnesses found in Texas; (3) the cost of attendance for willing witnesses is neutral because Volkswagen did not designate "key" witnesses and because, given the proximity of Dallas to the Marshall Division, the cost of having witnesses attend a trial in Marshall would be minimal; and (4) the local interest in having localized interests decided at home factor is neutral because, although the accident occurred in Dallas, Texas, the citizens of Marshall, Texas, "would be interested to know whether there are defective products offered for sale in close proximity to the Marshall Division." Based on this analysis, the district court concluded that Volkswagen "has not satisfied its burden of showing that the balance of convenience and justice weighs in favor of transfer."

(c)

We consider first the private interest factor concerning the relative ease of access to sources of proof. Here, the district court's approach reads the sources of proof requirement out of the § 1404(a) analysis, and this despite the fact that this Court has recently reiterated

that the sources of proof requirement is a meaningful factor in the analysis. *See In re Volkswagen I*, 371 F.3d at 203. That access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous. All of the documents and physical evidence relating to the accident are located in the Dallas Division, as is the collision site. Thus, the district court erred in applying this factor because it does weigh in favor of transfer.

The second private interest factor is the availability of compulsory process to secure the attendance of witnesses. As in *In re Volkswagen I*, the non-party witnesses located in the city where the collision occurred "are outside the Eastern District's subpoena power for deposition under Fed. R. Civ. P. 45(c)(3)(A)(ii)," and any "trial subpoenas for these witnesses to travel more than 100 miles would be subject to motions to quash under Fed.R.Civ.P. 45(c)(3)." *Id.* at 205 n. 4. Moreover, a proper venue that does enjoy *absolute* subpoena power for both depositions and trial—the Dallas Division—is available. As we noted above, the venue transfer analysis is concerned with convenience, and that a district court can deny any motions to quash does not address concerns regarding the convenience of parties and witnesses. Thus, the district court erred in applying this factor because it also weighs in favor of transfer.

The third private interest factor is the cost of attendance for willing witnesses. Volkswagen has submitted a list of potential witnesses that included the

third-party defendant, accident witnesses, accident investigators, treating medical personnel, and the medical examiner—all of whom reside in Dallas County or in the Dallas area. Volkswagen also has submitted two affidavits, one from an accident witness and the other from the accident investigator, that stated that traveling to the Marshall Division would be inconvenient. Volkswagen also asserts that the testimony of these witnesses, including an accident witness and an accident investigator, is critical to determining causation and liability in this case.[12]

In *In re Volkswagen I* we set a 100-mile threshold as follows: "When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." 371 F.3d at 204-05. We said, further, that it is an "obvious

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12. The Singletons argue that Volkswagen has not provided affidavits from these individuals indicating what specific testimony they might offer, has not explained why such testimony is important or relevant, and has not indicated that such testimony is disputed. In the *forum non conveniens* context, however, we have rejected "the imposition of a blanket rule requiring affidavit evidence." *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 371-72 (5th Cir.1992); *see also Piper Aircraft*, 454 U.S. at 258, 102 S.Ct. 252 (rejecting the contention "that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum").

conclusion" that it is more convenient for witnesses to testify at home and that "[a]dditional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment." *Id.* at 205. The district court disregarded our precedent relating to the 100-mile rule. As to the witnesses identified by Volkswagen, it is apparent that it would be more convenient for them if this case is tried in the Dallas Division, as the Marshall Division is 155 miles from Dallas. Witnesses not only suffer monetary costs, but also the personal costs associated with being away from work, family, and community. Moreover, the plaintiffs, Richard Singleton and Ruth Singleton, also currently reside in the Dallas Division (Amy Singleton resides in Kansas). The Singletons have not argued that a trial in the Dallas Division would be inconvenient to them; they actually have conceded that the Dallas Division would be a convenient venue. The district court erred in applying this factor as it also weighs in favor of transfer.

The only contested public interest factor is the local interest in having localized interests decided at home. Here, the district court's reasoning again disregarded our precedent in *In re Volkswagen I*. There, under virtually indistinguishable facts, we held that this factor weighed heavily in favor of transfer. *Id.* at 205-06. Here again, this factor weighs heavily in favor of transfer: the accident occurred in the Dallas Division, the witnesses to the accident live and are employed in the Dallas

Division, Dallas police and paramedics responded and took action, the Volkswagen Golf was purchased in Dallas County, the wreckage and all other evidence are located in Dallas County, two of the three plaintiffs live in the Dallas Division (the third lives in Kansas), not one of the plaintiffs has ever lived in the Marshall Division, and the third-party defendant lives in the Dallas Division. In short, there is no relevant factual connection to the Marshall Division.

Furthermore, the district court's provided rationale—that the citizens of Marshall have an interest in this product liability case because the product is available in Marshall, and that for this reason jury duty would be no burden—stretches logic in a manner that eviscerates the public interest that this factor attempts to capture.[13] The district court's provided rationale could apply virtually to any judicial district or division in the United States; it leaves no room for consideration of those actually affected—directly and indirectly—by the controversies and events giving rise to a case. That the residents of the Marshall Division "would be interested to know" whether a defective product is available does not imply that they have an interest—that is, a stake—in the resolution of this controversy. Indeed, they do not, as they are not in any relevant way connected to the events that gave rise to this suit. In contrast, the residents of the Dallas Division have extensive

13. Moreover, the facts do not favor the logic presented. The record indicates that the Volkswagen Golf was purchased from a location in the Dallas Division, and that Marshall, Texas, has no Volkswagen dealership.

connections with the events that gave rise to this suit. Thus, the district court erred in applying this factor as it also weighs in favor of transfer.

4.

The reader will remember that we began our discussion by addressing the three requirements set out by the Supreme Court in *Cheney* for the issuance of the writ of mandamus. Up until this point, all of our discussion has focused upon the second requirement: that the right to mandamus is clear and indisputable. The remaining question as to this second requirement is whether the errors we have noted warrant mandamus relief; that is, whether the district court clearly abused its discretion in denying Volkswagen's transfer motion. The errors of the district court—applying the stricter *forum non conveniens* dismissal standard, misconstruing the weight of the plaintiffs' choice of venue, treating choice of venue as a § 1404(a) factor, misapplying the *Gilbert* factors, disregarding the specific precedents of this Court in *In re Volkswagen I*, and glossing over the fact that not a single relevant factor favors the Singletons' chosen venue—were extraordinary errors. Indeed, "[t]he only connection between this case and the Eastern District of Texas is plaintiffs' choice to file there." *In re Volkswagen of Am., Inc.*, 223 Fed.Appx. 305, 307 (5th Cir.2007) (Garza, J., dissenting).

In the light of the above, we hold that the district court's errors resulted in a patently erroneous result.

Thus, Volkswagen's right to issuance of the writ is clear and indisputable, and the second requirement, under *Cheney*, for granting a petition for a writ of mandamus is therefore satisfied.

B.

We now return to the first and the third requirements for determining whether a writ should issue, as provided by the Supreme Court in *Cheney*.

The first requirement—that the petitioner must have no other adequate means to attain relief—is certainly satisfied here. As Judge Posner has noted, a petitioner "would not have an adequate remedy for an improper failure to transfer the case by way of an appeal from an adverse final judgment because [the petitioner] would not be able to show that it would have won the case had it been tried in a convenient [venue]." *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir.2003); *see* Fed.R.Civ.P. 61 (harmless error rule). Moreover, interlocutory review of transfer orders under 28 U.S.C. § 1292(b) is unavailable. *Garner v. Wolfinbarger*, 433 F.2d 117, 120 (5th Cir.1970). And the harm—inconvenience to witnesses, parties and other—will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle. Thus, the writ is not here used as a substitute for an appeal, as an appeal will provide no remedy for a patently erroneous failure to transfer venue.

As to the third requirement for granting a petition for a writ of mandamus, we must assure ourselves that

it is appropriate in this case. We have addressed most of the reasons outlined above. The district court clearly abused its discretion and reached a patently erroneous result. And it is indisputable that Volkswagen has no other adequate remedy that would provide it with relief. Further, writs of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case. *See United States v. Bertoli*, 994 F.2d 1002, 1014 (3d Cir.1993). Because venue transfer decisions are rarely reviewed, the district courts have developed their own tests, and they have applied these tests with too little regard for consistency of outcomes. Thus, here it is further appropriate to grant mandamus relief, as the issues presented and decided above have an importance beyond this case. And, finally, we are aware of nothing that would render the exercise of our discretion to issue the writ inappropriate.

We therefore conclude that all three of the *Cheney* requirements for mandamus relief are met in this case.

V.

Thus, for the reasons assigned above, we grant Volkswagen's petition for a writ of mandamus. The Clerk of this Court shall therefore issue a writ of mandamus directing the district court to transfer this case to the United States District Court for the Northern District of Texas, Dallas Division.

MANDAMUS GRANTED;
TRANSFER OF CASE ORDERED.

Appendix A

KING, Circuit Judge, with whom W. EUGENE DAVIS, WIENER, BENAVIDES, CARL E. STEWART, DENNIS, and PRADO, Circuit Judges, join, dissenting:

In order to grant mandamus here, the majority proceeds by plucking the standard "clear abuse of discretion" out of the narrow context provided by the Supreme Court's mandamus precedent and then confecting a case—not the case presented to the district court—to satisfy its new standard. Notwithstanding almost two hundred years of Supreme Court precedent to the contrary, the majority utilizes mandamus to effect an interlocutory review of a nonappealable order committed to the district court's discretion. I respectfully dissent.

Before getting into the majority's analysis and its flaws, it is important to describe the case actually presented to the district court. The majority notes briefly that this is a products liability case, but its entire opinion proceeds as if this were simply a case in which the victims of a Dallas traffic accident were suing the driver of the offending car. That is not this case. The Singletons' Volkswagen Golf was indeed hit on its left rear panel by Colin Little, spun around, and slid rear—first into a flat-bed trailer parked by the side of the road. Emergency personnel found an unconscious Richard Singleton in his fully reclined passenger seat with Mariana Singleton (who was seated directly behind him) trapped underneath. Mariana later died from the head trauma she received from the seat, and Richard was left paraplegic. The Singletons sued Volkswagen, alleging

that the seat adjustment mechanism of Richard's seat was defectively designed, resulting in a collapse of the seat during the accident. Thus, the case before the district court is first and foremost a products liability, design defect case that will depend heavily on expert testimony from both the plaintiffs and Volkswagen. No claim is made by Volkswagen that any of its experts is Dallas-based, and whether this case is tried in Marshall or Dallas will make little, if any, difference—Volkswagen will be able to get its experts (from Germany or elsewhere) to trial regardless. The Dallas connections with the original accident become relevant if there is a finding of a design defect and the court turns to the third party action by Volkswagen against Colin Little, raising issues of causation and damages. Pretrial discovery and the trial itself will have to address those issues, but they are not the only, or even the primary, focus of this case. Finally, Little, the other party to the accident, has explicitly stated that the Eastern District is not an inconvenient forum for him.

The majority has correctly identified the three requirements for the issuance of a writ: (1) "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires"; (2) "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable"; and (3) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (internal quotation marks and citations omitted).

Where we differ is in the application of *Cheney*'s three requirements. In particular, as I explain below, the majority fundamentally misconstrues *Cheney*'s second requirement, which strictly limits mandamus to a "clear abuse of discretion or usurpation of judicial power." *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953) (internal quotation marks omitted); *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 571 (5th Cir.2006) (Dennis, J., concurring). This case involved no such "clear abuse of discretion" or "usurpation of judicial power," and even the majority does not contend that the district court exceeded its power or authority under § 1404(a). Whether we agree with the district court's decision not to transfer this case is not controlling. There is no question that, when the district court acts within its power and authority, mandamus is inappropriate to challenge the district court's decision.

Addressing the second *Cheney* requirement, the majority states that Volkswagen's right is clear and indisputable if the district court clearly abused its discretion. The majority explains that it will not "issue a writ to correct a mere abuse of discretion. . . . [A] writ is appropriate to correct a clear abuse of discretion." But how the majority differentiates "clear abuse" from "mere abuse" is anything but clear. To find clear abuse, the majority "review[s] carefully the circumstances" before the district court and goes on to find five specific "errors" in the district court's decision. Because Volkswagen concedes that the district court considered all the proper § 1404(a) transfer factors and no improper

ones, the majority must reweigh these factors in order to find its errors. The majority's findings on these errors do not bear close inspection.

The district court first allegedly erred because it assigned too much weight to the plaintiffs' choice of venue by applying the *forum non conveniens* dismissal standard. The majority reaches this conclusion by completely mischaracterizing the district court's order. Essentially, the majority rests its conclusion on the fact that the district court's order denying transfer states that the movant "must show that the balance of convenience and justice substantially weighs in favor of transfer." For the majority, the district court's use of the word "substantially" indicates that it was requiring Volkswagen to make the showing necessary to obtain a *forum non conveniens* dismissal. But that is simply not the case. The explanation for the lower court's use of "substantially" becomes apparent when it is considered in the complete context of the transfer denial and the denial of reconsideration—that is, after a "careful review," which the majority does not make. In denying the transfer motion, the district court described the movant's burden in a variety of ways: that the balance of convenience and justice must "substantially" weigh in favor of transfer; that "[t]he plaintiff's choice of forum will not be disturbed unless it is clearly outweighed by other factors"; and that the plaintiffs' "choice should not be lightly disturbed." In denying Volkswagen's motion for reconsideration, the district court explained that "decisive weight" was not given to the plaintiffs' choice; it was simply one factor among many. Thus, the district

court drew upon several formulations common to the venue transfer context to describe the unremarkable notion that the party seeking transfer bears some heightened burden in demonstrating that a transfer is warranted. It did not apply the *forum non conveniens* dismissal standard.

Additionally under the plaintiff's choice analysis, the majority distorts the relationship between §§ 1391 and 1404. Congress has afforded plaintiffs a broad venue privilege in § 1391(a) and (c). And although aspersions are often cast on plaintiffs' "forum shopping," frequently by defendants also "forum shopping," we have explicitly stated that a plaintiff's motive for choosing a forum "is ordinarily of no moment: a court may be selected because its docket moves rapidly, its discovery procedures are liberal, its jurors are generous, the rules of law applied are more favorable, or the judge who presides in that forum is thought more likely to rule in the litigant's favor." *McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255, 1261-62 (5th Cir.1983); *cf. Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 707, 62 S.Ct. 827, 86 L.Ed. 1129 (1942) (Jackson, J., concurring) (stating, in the context of FELA's broad forum selection clause, that "[t]here is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner"). Section 1404(a) does temper plaintiffs' broad statutory right in venue selection, but how Congress went about doing so is telling. Congress did not restrict the range of permissible venues available to plaintiffs—that is, it did not give defendants the right to be sued only in certain forums, such as the most convenient.

Rather, § 1404(a) vests a district court with the authority to transfer a case in its discretion. *Balawajder v. Scott*, 160 F.3d 1066, 1067 (5th Cir.1998). Section 1404(a), therefore, is not the mandatory tool to "prevent plaintiffs from abusing their privilege under § 1391" that the majority describes; it is a discretionary tool to be applied by a district court "[f]or the convenience of parties and witnesses, in the interest of justice." The majority's review of the plaintiffs' choice, then, is both misleading as to the facts and wrong on the law.

Continuing under *Cheney*'s second requirement, the majority's "careful review" of the remaining four § 1404(a) transfer factors further fails to take account of the realities that surround a transfer decision and the realities in this particular case. Generally speaking, venue transfer motions are filed very early in the case. (For example, Volkswagen's motion was filed three weeks after the Singletons' original complaint.) At this early stage, assessing what best serves the "convenience of parties and witnesses" and "interests of justice" is hardly an exact science, since it is often unclear how the lawsuit will develop or what issues will be key. But the district court can draw on its experience with the day-to-day reality of litigation issues—an area in which appellate courts lack expertise. As former Second Circuit Judge Jerome Frank described the § 1404(a) inquiry: " 'Weighing' and 'balancing' are words embodying metaphors which, if one is not careful, tend to induce a fatuous belief that some sort of scales or weighing machinery is available. Of course it is not. At best, the judge must guess, and we should accept his

guess unless it is too wild." *Ford Motor Co. v. Ryan*, 182 F.2d 329, 331-32 (2d Cir.1950) (footnote omitted).

I now turn to the majority's take on the four remaining § 1404(a) factors. The majority would have us believe that since this case involves only a Dallas traffic accident, Dallas is the only convenient location for the Singletons' suit. But, while the convenience inquiry may begin with listing this case's Dallas connections, it does not end there. First for the Dallas documents: the district court's reasoning, where it "note[d] that this factor has become less significant" and concluded that "[a]ny documents or evidence can be easily transported to Marshall," hardly "reads the sources of proof requirement out of the" transfer analysis. Instead, the district court considered the reality that the Northern and Eastern Districts have required ECF (electronic case filing) for a long time and that all the courtrooms are electronic. This means that the documents will be converted to electronic form, and whether they are displayed on monitors in Dallas or Marshall makes no difference to their availability. Secondly, the court's subpoena power runs throughout the state, and an experienced district court can properly discount the likelihood of an avalanche of motions to quash. The majority's novel notion of "absolute subpoena power" results in only the most marginal of convenience gains, if any. Thirdly, the Dallas witnesses will not likely be inconvenienced because (as Volkswagen recognizes) discovery will be, in all likelihood, conducted in Dallas. Additionally, witnesses necessary to establish damages for Mariana's wrongful death—her teachers,

neighbors, and friends—all reside in the Eastern District (where the Singletons resided at the time of the accident). And the majority's "100-mile rule"[1] is no proxy for considering the realistic costs and inconvenience for witnesses that will attend the trial, particularly in a state as expansive as Texas. As for the two non-party fact witnesses who submitted identical affidavits asserting inconvenience, if the case goes to trial and if they end up testifying (two very big "ifs," the district court was no doubt aware), the court could reasonably conclude that traveling 150 miles, or two hours on a four-lane interstate (I-20), each way is only minimally inconvenient. And finally, with regard to the local interests factor, the majority's assertion that Eastern District residents "are not in any relevant way connected to the events that gave rise to this suit" overstates the case and glosses over the fact that this is a products liability suit. A Dallas traffic accident may have

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1. The so-called "100-mile rule," now enshrined by the en banc court, was made up out of the whole cloth by the panel that decided *In re Volkswagen AG*, 371 F.3d 201, 204-05 (5th Cir.2004). It reads:

> When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.

The power of this court to establish such a "rule" escapes me. A footnote "observe[s]" that a trial subpoena for a non-party witness is subject to a motion to quash when that witness must travel more than 100 miles. *Id.* at 205 n. 4.

triggered the events that revealed a possibly defective product, but that does not change the nature of this suit. Drivers in the Eastern District could be connected to the actual issues in this case as they may be interested to learn of a possibly defective product that they may be driving or that is on their roads.[2] Thus, the majority's "careful review" under the § 1404(a) transfer factors is both erroneous as to its method and misleading as to the facts.

Having identified five "errors" in the district court's § 1404(a) analysis, the majority moves on to declare the sum of these errors as a "clear abuse" justifying the writ (as distinguished from "mere abuse" which wouldn't) by labeling the errors "extraordinary errors" and concluding that those "errors resulted in a patently erroneous result." "Thus, Volkswagen's right to the issuance of the writ is clear and indisputable, and the second requirement, under *Cheney*, . . . is therefore satisfied."

The majority moves on to *Cheney*'s remaining requirements. The first requirement, that the petitioner "have no other adequate means to attain relief," is "certainly satisfied here." This must be so because a

2. The district court did recognize Dallas residents' interest in a local traffic accident and balanced that interest against the Marshall residents' ongoing interest in possibly defective products within their district, concluding that this factor was neutral. The majority holds, however, that a district court may never consider the interests of those that might be affected by an alleged defective product.

petitioner " 'would not be able to show that it would have won the case had it been tried in a convenient [venue]' " (alteration in the original) (quoting *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir.2003), and citing FED.R.CIV.P. 61). We are told, then, that direct appeal is effectively unavailable to address a possible error in a § 1404(a) transfer decision. That is flat wrong. Direct appeal is available to review a transfer decision, as demonstrated by *Action Industries, Inc. v. United States Fidelity & Guaranty Co.*, 358 F.3d 337 (5th Cir.2004), a decision cited by the majority and in which a § 1404(a) transfer decision was reviewed after a final judgment. That such an appeal may have limited success due to the harmless error rule, FED.R.CIV.P. 61, does not mean—here or anywhere else that I know of—that direct appeal is "unavailable." But it is telling that a refusal to transfer from Marshall to Dallas is unlikely, in the majority's view, to affect Volkswagen's substantial rights: if Volkswagen's substantial rights will not likely be affected, how can this case satisfy the admittedly different, but even more stringent, requirements for mandamus?

The third *Cheney* requirement—that the issuing court be satisfied that the writ is appropriate—is, for the majority, easily met. Because "[t]he district court clearly abused its discretion," "Volkswagen has no other adequate remedy," and "district courts . . . have applied [venue transfer tests] with too little regard for consistency of outcomes," the majority convinces itself that mandamus is appropriate and issues the writ.

Despite the majority's own recognition that a § 1404(a) transfer decision is a nonappealable interlocutory order, the majority's decision is in striking derogation of remarkably consistent Supreme Court precedent stretching back to Chief Justice Marshall's statement in *Bank of Columbia v. Sweeny* that using mandamus in this way is "a plain evasion of the provision of the Act of Congress, that *final* judgments only should be brought before this Court for re-examination." 26 U.S. (1 Pet.) 567, 569, 7 L.Ed. 265 (1828) (emphasis in original). As the majority opinion seems to recognize, but then ignores, the Supreme Court has been explicit on repeated occasions that mandamus must not devolve into "interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98 n. 6, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967).

> [T]he most that can be claimed . . . is that [the district court] may have erred in ruling on matters within [its] jurisdiction. But "[t]he extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals." Mandamus, it must be remembered, does not "run the gauntlet of reversible errors." Its office is not to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power.

Id. at 103-04, 88 S.Ct. 269 (internal citations omitted) (quoting first *Parr v. United States*, 351 U.S. 513, 520,

76 S.Ct. 912, 100 L.Ed. 1377 (1956), and then *Bankers Life*, 346 U.S. at 382-83, 74 S.Ct. 145); *e.g.*, *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943) ("[Mandamus] may not appropriately be used merely as a substitute for the appeal procedure prescribed by . . . statute."); *Bankers Life*, 346 U.S. at 383, 74 S.Ct. 145 ("[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial . . . ." (internal citation omitted)); *see also In re Horseshoe Entm't*, 337 F.3d 429, 435 (5th Cir.2003) (Benavides, J., dissenting) ("Mandamus is an extraordinary writ and should not be a substitute for appeal.").

The Court's prohibition on the use of mandamus as a substitute for appeal is based not only on the violation of 28 U.S.C. §§ 1291-1292 that it would entail but also on the resulting delay that those statutes were intended to avoid. This case is a painful and ironic example of that delay. Volkswagen's petition for mandamus was filed in this court on January 23, 2007, and this court will finally dispose of it during October 2008. Discovery continued in the district court until this court—apparently in order to prevent the case from becoming moot—stayed the trial proceedings on September 18, 2007, one day before the scheduled close of discovery. The second panel's opinion was issued one day after jury selection was slated to begin. In all probability, this case would have been concluded on its merits long before our court finishes with it, likely, not long after the second panel's opinion issued. The delay here (even without

taking the en banc process into account) perfectly exemplifies the harm caused by conducting an interlocutory review under the aegis of mandamus.[3]

In order to enable the majority to correct the district court's "errors" in applying § 1404(a), the majority misapplies the "clear abuse of discretion" standard provided by the Supreme Court by divorcing the standard from the context that gave it meaning. The Court, in *Bankers Life*, held that "clear abuse of discretion" does not involve a district court's possibly erroneous exercise of its conceded authority; rather, clear abuse occurs when the district court lacks the judicial power or authority to make the decision that it did. In *Bankers Life*, the petitioner was a plaintiff in a private antitrust suit naming numerous defendants, one of whom resided outside the district in which the suit was filed. 346 U.S. at 380, 74 S.Ct. 145. Based on the applicable venue statute, the district court held that venue was improper as to that nonresident defendant and transferred the case pursuant to 28 U.S.C. § 1406(a).[4] *Id.* at 380-81, 74 S.Ct. 145. In seeking the writ, the petitioner's sole argument was that the district

3. The petition for mandamus in *In re Horseshoe Entertainment*, 337 F.3d 429 (5th Cir.2003), was filed on July 11, 2002, and mandamus issued on July 1, 2003. There was no en banc consideration of that case.

4. Section 1406(a) permits the transfer of a case where venue is improperly laid and is essentially "analogous" to § 1404(a). *Van Dusen v. Barrack*, 376 U.S. 612, 621 n. 11, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964).

court had the power to order the transfer only if venue was improper and that venue was, in fact, proper. *Id.* at 381, 74 S.Ct. 145. The Court, however, declined to review the district court's possibly erroneous interlocutory decision and held that the alleged error in applying the statute was not a clear abuse of discretion. *Id.* at 382-83, 74 S.Ct. 145. It stated:

> [The district court's] decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" of the sort held to justify the writ in *De Beers Consolidated Mines v. United States*, 325 U.S. 212, 217, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945). This is not such a case.

Id. (citations and footnotes omitted). For the Court, no "clear abuse of discretion" occurred because there was no question that the district court had the power or authority to do what it purported to do—transfer a case from an improper venue to a proper venue—and the petitioner's sole argument regarding a possibly erroneous interlocutory order did not involve a "clear abuse of discretion." That is, for the purposes of mandamus, a "clear abuse of discretion" occurs when the district court has acted outside the scope of its power or authority.[5] It is therefore a mistake to equate the kind of ordinary error that might be labeled an "abuse of discretion" on appeal with the kind of error that justifies mandamus, as the majority does. Our inquiry on mandamus should center on reviewing errors that implicate a district court's power to act as it did. There is no claim here that the district court did not have the

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5. *De Beers Consolidated Mines,* referenced in *Bankers Life,* is further instructive. There, the Court stated that review under the All Writs Act is appropriate "if the [district court's] order was beyond the powers conferred upon [that] court." 325 U.S. 212, 217, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945). It went on:

> When Congress withholds interlocutory reviews, [the All Writs Act] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power the situation falls precisely within the allowable use of [the All Writs Act].

Id.

judicial power to deny the transfer motion. The claim is that it erred in the judgment that it made when it exercised the power that it concededly has. That is not the basis for a writ.

The Court has also been explicit in prohibiting the use of mandamus to correct the alleged errors of a district court in a decision committed to its discretion. "Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980) (internal quotation marks and citation omitted). The Court's reason for denying the use of mandamus to review a discretionary decision is instructive. Were it otherwise, the Court warned, "[t]he office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction." *Bankers Life*, 346 U.S. at 383, 74 S.Ct. 145; *see also Will*, 389 U.S. at 104, 88 S.Ct. 269 (stating that the office of mandamus "is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power" (quoting *Bankers Life*, 346 U.S. at 383, 74 S.Ct. 145)). Where, as the majority does here, an appellate court reviews the district court's analysis of the venue transfer factors and reweighs each factor as it feels appropriate, it is doing nothing less than controlling the district court's decision, and thus enlarging mandamus in the precise fashion that the *Bankers Life* Court warned against.

In sum, as this court has held for decades, on application for mandamus to direct a § 1404(a) transfer, when the district court has properly construed the statute and considered all necessary facts and factors, we should "not attempt to recite the facts nor to weigh and balance the factors which the District Court was required to consider in reaching its decision." *Ex parte Chas. Pfizer & Co., Inc.*, 225 F.2d 720, 723 (5th Cir.1955); *see also In re Horseshoe Entm't*, 337 F.3d at 435 (Benavides, J., dissenting) ("All necessary facts and factors were considered . . . and the transfer statute was properly construed. Under these circumstances we should not even attempt to weigh and balance the factors which the district court was required to consider in reaching its decision.").

Cheney describes mandamus as a " 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.' " 542 U.S. at 380, 124 S.Ct. 2576 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947)). To say the least, this is anything but a "really extraordinary cause." Volkswagen seeks no more than to transfer this case 150 miles from the Eastern District of Texas to the Northern District of Texas. As we said many years ago (about a transfer from the Southern to the Northern District of Alabama), when we continued to be faithful to the Supreme Court's direction, "[t]hat is not the basis for a writ." *Garner v. Wolfinbarger*, 433 F.2d 117, 120-21 (5th Cir.1970). The bottom line is that how one assesses the § 1404(a) transfer factors in this case is essentially a matter of judgment. The district court's judgment, informed by

years of trial experience in cases like this, differs from that of the majority, and in my view the district court's take on this case is more faithful to the actual case before it than is the majority's take. But even if I, sitting as a district judge, would have granted the motion to transfer, that kind of difference in judgment, particularly in a matter committed to the district court's discretion, does not justify an extraordinary writ.

Despite the Supreme Court's crystal clear guidance that mandamus is unavailable in these circumstances, conflicts among the circuits and within individual circuits have proliferated on the question whether the writ may be used as a tool to review a district court's § 1404(a) transfer decision. *See generally* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3855, at 332 & n.29 (3d ed.2007). As the late Judge Friendly recognized more than 40 years ago, "[a]ppellate courts die hard in relinquishing powers stoutly asserted but never truly possessed. . . . [W]e should . . . end this sorry business of invoking a prerogative writ to permit appeals, which Congress withheld from us, from discretionary orders fixing the place of trial." *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 445-46 (2d Cir.1966) (Friendly, J., concurring).

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED OCTOBER 24, 2007 REVISED OCTOBER 25, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-40058

In Re: VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation; Volkswagen AG, a foreign corporation organized under the laws of Germany,

Petitioners.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 206-CV-222

Before JOLLY, CLEMENT and OWEN, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Petitioners Volkswagen AG and Volkswagen of America, Inc. (collectively, "Volkswagen"), defendants in the Marshall Division of the Eastern District of Texas, seek a writ of mandamus directing the district court to transfer this case to the Dallas Division of the Northern District of Texas, where the automobile accident and the injuries to the parties occurred. The plaintiffs exercised their privilege to choose the Marshall Division as the forum for their case, but Marshall has no connection to the parties or the facts of the case.

Appendix B

For the reasons presented below, we grant Volkswagen's petition for a writ of mandamus and remand with instructions to transfer the case to the Northern District of Texas, Dallas Division.

I.

On the morning of May 21, 2005, a Volkswagen Golf automobile was struck from behind and propelled rear-first into a flat-bed trailer parked on the shoulder of a freeway in Dallas, Texas. Ruth Singleton was driving the Volkswagen Golf. Richard Singleton was a passenger. Mariana Singleton, Richard Singleton and Ruth Singleton's granddaughter, was also a passenger. Richard Singleton was seriously injured in the accident. Mariana Singleton died as result of her injuries.

Richard Singleton, Ruth Singleton, and Amy Singleton (Mariana's mother) filed suit against Volkswagen in the Marshall Division of the United States District Court for the Eastern District of Texas ("Marshall Division"). The complaint alleged that design defects in the Volkswagen Golf caused Richard's injuries and Mariana's death. Volkswagen filed a third-party complaint against the driver of the vehicle that struck the Singletons, alleging that the Singletons had the ability to sue him but did not, and that his negligence was the only proximate cause of the damages.

Pursuant to 28 U.S.C. § 1404(a), Volkswagen moved to transfer venue to the Dallas Division of the Northern District of Texas ("Dallas Division"). Volkswagen

asserted that a transfer was warranted as (1) the Volkswagen Golf was purchased in Dallas County, Texas; (2) the accident occurred on a freeway in Dallas, Texas; (3) Dallas residents witnessed the accident; (4) Dallas police and paramedics responded and took action; (5) a Dallas doctor performed the autopsy; (6) the third-party defendant lives in Dallas County, Texas; (7) none of the plaintiffs live in the Marshall Division; (8) no known party or significant non-party witness lives in the Marshall Division; and (9) none of the facts giving rise to this suit occurred in the Marshall Division. The district court denied the motion, holding that Volkswagen had not satisfied its burden of showing that the balance of convenience and justice weighs substantially in favor of transfer.

Volkswagen then filed a motion for reconsideration, arguing that the district court gave inordinate weight to the plaintiffs' choice of forum and that the district court failed properly to weigh the venue transfer factors. The district court also denied the motion for reconsideration, for the same reasons presented in its denial of Volkswagen's motion for transfer.

Volkswagen then petitioned this court for a writ of mandamus. In a *per curiam* opinion, a divided panel of this court denied the petition and declined to issue a writ. *In re Volkswagen of Am. Inc.*, 223 Fed.Appx. 305 (5th Cir.2007). The panel majority held that the district court did not abuse its discretion in denying Volkswagen's motion to transfer. Judge Garza wrote a dissenting opinion, noting that "[t]he only connection

between this case and the Eastern District of Texas is plaintiffs' choice to file there; *all* other factors relevant to transfer of venue weigh overwhelmingly in favor of the Northern District of Texas." *Id.* at 307 (Garza, J., dissenting).

Volkswagen filed a petition for rehearing *en banc*. The original panel interpreted the petition for rehearing *en banc* as a petition for panel rehearing, granted it, withdrew its decision, and directed the Clerk's Office to schedule the petition for oral argument. This panel then heard oral argument on the issues raised for review.

II.

"Mandamus is an extraordinary writ. It . . . and is not a substitute for an appeal. We will issue the writ only in the absence of other adequate remedies when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re Chesson*, 897 F.2d 156, 159 (5th Cir.1990). However, although "few litigants have surmounted the formidable obstacles and secured the writ," this court has "recognized the availability of mandamus as a limited means to test the district court's discretion in issuing transfer orders." *In re Horseshoe Entm't*, 337 F.3d 429, 432 (5th Cir.2003) (internal quotations omitted). We have enumerated standards for determining the propriety of a district court's ruling on a motion to transfer under § 1404(a), and it is these standards that determine the issues raised on appeal in this case.

Appendix B

The *Pfizer* standards for determining the propriety of a district court's ruling on a motion to transfer ask: (a) Did the district court correctly construe and apply the relevant statutes; (b) Did the district court consider the relevant factors incident to ruling upon a motion to transfer; and (c) Did the district court abuse its discretion in deciding the motion to transfer. *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir.2004) [hereinafter *In re Volkswagen I*]; *Ex parte Chas. Pfizer & Co.*, 225 F.2d 720, 723 (5th Cir.1955).

The *Pfizer* standards require a careful review of "the circumstances presented to and the decision making process used by" the district court. *In re Horseshoe*, 337 F.3d at 432. The standards do not allow us to replace the district court's exercise of discretion with our own. Indeed, we will issue a writ only when there is an abuse of discretion. *In re Volkswagen I*, 371 F.3d at 203. But, again, the *Pfizer* standards do require a careful review of the district court's exercise of its discretion.

III.

The preliminary question under the change of venue statute, 28 U.S.C. § 1404, is whether the suit could have been filed originally in the destination venue. *Id.* Volkswagen seeks to transfer this case to the Dallas Division of the Northern District of Texas. There is no question but that this suit originally could have been filed in the Dallas Division. *See* 28 U.S.C. § 1391.

Further, provisions of § 1404(a) state that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Our precedents indicate that, when considering a § 1404 motion to transfer, a district court should consider a number of private and public interest factors, "none of which can be said to be of dispositive weight." *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir.2004).[1] The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re Volkswagen I*, 371 F.3d at 203 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)). The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law." *Id.*

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1. While we have not indicated that the factors that we have enumerated are exhaustive or exclusive, the failure to follow with some precision the test we have set out necessarily produces inconsistent results in this Circuit. Absent exceptional circumstances, the district courts of the Fifth Circuit must consider motions to transfer under the rubric we have provided.

It is also clear that a plaintiff's choice of forum is one of the several factors to be considered under the § 1404(a) venue transfer analysis. *Ex parte Chas. Pfizer & Co.*, 225 F.2d at 722; *In re Horseshoe*, 337 F.3d at 434. We address this consideration first, and then address the private and public interest factors presented above.

A.

Volkswagen argues that the district court abused its discretion by applying the wrong legal standard when, giving plaintiffs' choice of forum an elevated status, it stated that the moving party must show that the balance of convenience and justice *substantially* weighs in favor of transfer. This standard, Volkswagen argues, reflects the much stricter forum non conveniens dismissal standard, and it is inappropriately applied in the § 1404(a) context. We agree.

The role of the plaintiff's choice of forum in the venue transfer analysis has not been clearly specified in our recent § 1404(a) cases. Indeed, the venue transfer factors that we have adopted do not include a consideration of the plaintiff's choice of forum at all, as these factors address only the convenience of parties and witnesses and the interests of justice. Our earlier § 1404(a) cases, however, specified the appropriate role of the plaintiff's choice of forum in the venue transfer analysis.

In *Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, we noted that a plaintiff's choice of forum is to be treated

"as a burden of proof question rather than one of a presumption." 321 F.2d 53, 56 (5th Cir.1963); *see also Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir.1966) ("At the very least, the plaintiff's privilege of choosing venue places the burden on the defendant to demonstrate why the forum should be changed."). The weight given to a plaintiff's choice of forum, then, corresponds with the burden that a moving party must meet to demonstrate that a transfer should be granted under § 1404(a).

We now turn to consider the cases that address the appropriate weight to be given to a plaintiff's choice of forum.

In *Veba-Chemie A.G. v. M/V Getafix*, we explained that the "heavy burden traditionally imposed upon defendants by the forum non conveniens doctrine—dismissal permitted only in favor of a *substantially* more convenient alternative—was dropped in the § 1404(a) context." 711 F.2d 1243, 1247 (5th Cir.1983) (emphasis added). We also have repeatedly acknowledged the Supreme Court's directive that § 1404(a) was "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than that required in the forum non conveniens context.[2] We therefore hold that

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2. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32, 75 S.Ct. 544, 99 L.Ed. 789 (1955); *see, e.g., Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am., Div. No. 1127 v. S. Bus Lines*, 172 F.2d 946, 948 (5th Cir.1949) (noting that forum non conveniens "[d]ismissal for inconvenience is not to be visited

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the district court erred in requiring Volkswagen to show that the balance of convenience and justice substantially weighs in favor of transfer.

Establishing only this point, however, leaves us without a dismissal standard; we must still determine the proper degree of deference to be given to a plaintiff's choice of forum.

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except when the choice of forum is a real hardship, or an imposition on the court. But here again we meet the Revision of Title 28. . . . Transfer is a less drastic matter than dismissal, for it involves no loss of time or pleading or costs; and no doubt a broader discretion may be exercised in ordering it."); *Ex parte Chas. Pfizer*, 225 F.2d at 722 (5th Cir.1955) (noting that the "doubt that may have at one time existed as to whether § 1404(a) liberalized and extended the doctrine of forum non conveniens" has been put to rest by the Supreme Court in *Norwood.*); *Humble Oil*, 321 F.2d at 56 (5th Cir.1963) (noting that the "avoidance of dismissal through § 1404(a) lessens the weight to be given the choice of forum factor, and to that extent broadens the discretion of the District Court"); *Dubin v. United States*, 380 F.2d 813, 816 (5th Cir.1967) ("Its purpose is to determine the most convenient forum from among two or more possibly correct ones. In substance, § 1404 is the statutory enactment of the doctrine of forum non conveniens tempered to allow transfer rather than dismissal."); *Ellis v. Great Sw. Corp.*, 646 F.2d 1099, 1103 n. 4 (5th Cir.1981) ("Section 1404(a) is a revision rather than just a codification of forum non conveniens. It permits federal courts to grant transfers on a lesser showing than is required under the common law doctrine and there is no need for pleadings or documents to be refiled in the transferee court. The relevant factors, however, are the same.").

Appendix B

We have, as outlined below, several conflicting panel opinions addressing the proper degree of deference to be given to a plaintiff's choice of forum. When panel opinions appear to conflict, this court must follow the earlier opinion. *Modica v. Taylor,* 465 F.3d 174, 183 (5th Cir.2006). But dicta, of course, is not binding authority. *United States v. Barnes,* 761 F.2d 1026, 1033 n. 14 (5th Cir.1985).

In our earliest case mentioning a defined weight to be given a plaintiff's choice of forum in the § 1404(a) context, *Rodriguez v. Pan Am. Life Ins. Co.*, we noted that a plaintiff's choice of forum is "highly esteemed." 311 F.2d 429, 434 (5th Cir.1962) (noting also that "transfers to other federal courts are quick and ready tools for our trial courts under 28 U.S.C. § 1404(a)"), *vacated on other grounds by Pan-Am. Life Ins. Co. v. Rodriguez,* 376 U.S. 779, 84 S.Ct. 1130, 12 L.Ed.2d 82 (1964). *Rodriguez,* however, is a forum non conveniens case. *Id.* at 432. We have found two other Fifth Circuit cases that, citing *Rodriguez,* note that a plaintiff's choice of forum is highly esteemed: *Time, Inc. v. Manning,* 366 F.2d 690, 698 (5th Cir.1966), and *Peteet v. Dow Chem. Co.,* 868 F.2d 1428, 1436 (5th Cir.1989).

In *Humble Oil,* a case that followed *Rodriguez* by less than a year, we noted that, in contrast to the forum non conveniens context, "the avoidance of dismissal through § 1404(a) lessens the weight to be given the choice of forum factor" and that "he who seeks the transfer must show good cause." 321 F.2d at 56. We further noted that the deference owed the plaintiff's

choice of forum did "no more than cast[ ] the burden of proof" on the moving party. *Id.* at 57. *Humble Oil* involved a motion for transfer under the now-amended Admiralty Rule 54. The portion of the rule under consideration provided that a district court "may, in its discretion, transfer the proceedings to any district court for the convenience of the parties." *Id.* at 54. The *Humble Oil* court referenced and applied § 1404(a) analysis as the admiralty rule, like § 1404(a), provided for a discretionary transfer. *Id.*

This court has also held that "unless the balance is strongly in favor of the defendant" the plaintiff's choice should rarely be disturbed. This formulation first appeared in *Marbury-Pattillo Constr. Co. v. Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir.1974). In *Bayside Warehouse* we referred to a 1947 Supreme Court case and observed that "[i]n *Gulf Oil Corp. v. Gilbert,* the Supreme Court elucidated upon the factors justifying a Section 1404(a) change of venue, but it was careful to point out that '[u]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum shall rarely be disturbed.' " *Id.* (internal citation omitted). *Bayside Warehouse* is a § 1404(a) case. But *Gilbert,* which was cited for the proposition that the balance must "strongly favor" the defendant, is not a § 1404(a) case. In fact, *Gilbert* is a forum non conveniens case, and it was decided in 1947, before Congress had even enacted § 1404(a). *See Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). *Bayside Warehouse,* then, is grounded in an error, or at least in an unexplained conflation of the forum non conveniens

analysis with that appropriate to § 1404(a). And this conflation seems to directly contradict the Supreme Court's directive that § 1404(a) was "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than that required in the forum non conveniens context. *Norwood*, 349 U.S. at 32, 75 S.Ct. 544 . We have found one other Fifth Circuit case that, citing *Bayside Warehouse*, notes that a plaintiff's choice of forum is strongly favored: *In re McDonnell-Douglas Corp.*, 647 F.2d 515, 517 (5th Cir.1981).

Again, when panel opinions appear to conflict, this court must follow the earlier opinion. *Modica*, 465 F.3d at 183. But dicta, as we have noted, is not binding authority. *Barnes*, 761 F.2d at 1033 n. 14. The discussion of § 1404(a) presented in *Rodriguez* is dicta, as the case was decided on forum non conveniens grounds. The discussion of § 1404(a) presented in *Humble Oil* is arguably dicta, as Admiralty Rule 54 applied rather than § 1404(a). But removing the discussion of § 1404(a) from *Humble Oil* would leave no basis for the decision reached by the *Humble Oil* court. Further, the language of the two rules is indistinguishable in any relevant way. This being so, we understand this panel to be bound by the *Humble Oil* decision. And as *Humble Oil* preceded *Bayside Warehouse*, to the extent that these two opinions conflict, we again find ourselves bound by *Humble Oil*.

Apart from the rules governing controlling decisions, we are assured in this holding by additional considerations. First, the "highly esteemed" and

"strongly favored" standards referenced above each suffer from significant defects. "Highly esteemed" is so vague as to be unworkable. "Strongly favored," though not vague as a statement, would have to be understood in the light of the Supreme Court decision in *Norwood*, which provided that § 1404(a) was "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than that required in the forum non conveniens context. 349 U.S. at 32, 75 S.Ct. 544. We would therefore have to give content to "strongly favored" without referencing the distinction between change of venue cases and the forum non conveniens cases from which the standard derives. This consideration, then, renders "strongly favored" vague in the context of applying § 1404(a).

Second, and more generally, under either of these standards, we would need to reconcile the content that might be given to these standards with our holding that "dismissal permitted only in favor of a *substantially* more convenient alternative—was dropped in the § 1404(a) context," *Veba-Chemie A.G.*, 711 F.2d at 1247 (emphasis added), and with our holding that "broader discretion" is to be exercised in the § 1404(a) context than in the forum non conveniens context, *S. Bus Lines*, 172 F.2d at 948, and with our holding that "§ 1404(a) liberalized and extended the doctrine of forum non conveniens," *Ex parte Chas. Pfizer*, 225 F.2d at 721. In sum, we would not survive a walk through the legal minefield of trying to reconcile either the "highly esteemed" or "strongly favored" standards—which are derived primarily from forum non conveniens cases—

with the language of § 1404(a), which provides for transfer "[f]or the convenience of parties and witnesses, in the interest of justice."

Third, and consequently, the standard presented in *Humble Oil* is most consistent with the language and with the intended purpose and effect of § 1404(a), which simply provides that a district court may transfer any civil action "[f]or the convenience of parties and witnesses, in the interest of justice."[3]

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3. *See Norwood*, 349 U.S. at 31, 75 S.Ct. 544 (" 'The forum non conveniens doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*' " (emphasis added) (quoting *All States Freight v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir.1952))); *see also Van Dusen v. Barrack*, 376 U.S. 612, 622, 624, 636-37, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) (" 'The idea behind § 1404(a) is that where a "civil action" to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court *more convenient* than another, the trial judge can, after findings, transfer the whole action to the more convenient court.' This remedial purpose—the individualized, case-by-case

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We agree, then, with the contention that the district court erred in requiring Volkswagen to show that the balance of convenience and justice substantially weighs in favor of transfer. Plaintiff's choice of forum is entitled to deference. Indeed, this deference establishes the burden that a moving party must meet in seeking a § 1404(a) transfer. But the appropriate standard for this burden is that established by *Humble Oil.* Namely, a party seeking a transfer "must show good cause." When viewed in the light of § 1404(a), to show good cause means that a moving party must demonstrate that a transfer is "[f]or the convenience of parties and witnesses, in the interest of justice." When the transferee forum is no more convenient than the chosen

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consideration of convenience and fairness—militates against restricting the number of permissible forums within the federal system. . . . The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum. . . . We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms." (emphasis added) (quoting *Cont'l Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 26, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960))); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) ("The statute was designed as a 'federal housekeeping measure,' allowing easy change of venue within a unified federal system." (quoting *Van Dusen*, 376 U.S. at 613, 84 S.Ct. 805)).

forum, the plaintiff's choice should not be disturbed. When the transferee forum is clearly more convenient, a transfer should be ordered.

Nevertheless, we sympathize with the district court in the instant case because our precedents have not been the model of clarity. Thus, although we hold that the district court erroneously applied the stricter forum non conveniens dismissal standard, we need not decide whether this error alone warrants mandamus relief in this case, as we decide this petition on other grounds.

B.

Volkswagen also argues that the district court abused its discretion in failing properly to consider and apply the private and public interest factors. Specifically, Volkswagen argues that, although the district court correctly enumerated these factors, the court abused its discretion by failing meaningfully to analyze and weigh them. We agree, for the reasons given below.[4]

1.

The first private interest factor to be considered is the relative ease of access to sources of proof. The district court observed that all of the documents and physical evidence relating to the accident are located in

4. We address only the private and public interest factors that are contested by the parties. Several of the factors clearly weigh neither for nor against transfer, as the parties acknowledge and as is often the case.

the Dallas Division. The district court found, however, that this factor does not weigh in favor of transfer as this factor has become less significant within venue transfer analysis because of advances in copying technology and information storage. Volkswagen asserts that this approach unilaterally reads the sources of proof requirement out of the § 1404(a) analysis, and this despite the fact that this court has recently reiterated that this factor is to be considered. *See In re Volkswagen I*, 371 F.3d at 203 (listing factors and citing cases).

The district court was certainly correct that advances in copying technology and information storage affect the access to sources of proof, and that district courts should consider the actual convenience or inconvenience of accessing sources of proof. But, that access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous. Here, all of the documents and physical evidence relating to the accident are located in the Dallas Division, as is the collision site. The district court erred in applying this factor because it does weigh in favor of transfer, although its precise weight may be subject to debate.

The second private interest factor to be considered is the availability of compulsory process to secure the attendance of witnesses. The district court observed that its subpoena power of non-party witnesses would be subject to motions to quash. As in *In re Volkswagen I*, the non-party witnesses located in

the city where the collision occurred "are outside the Eastern District's subpoena power for deposition under FED.R.CIV.P. 45(c)(3)(A)(ii)." *Id.* at 205 n. 4. And any "trial subpoenas for these witnesses to travel more than 100 FED.R.CIV.P. 45(c)(3)." *Id.* All of the witnesses in this case reside more than 100 miles from the Marshall Division. The district court discounted its lack of absolute subpoena power based on its ability to deny a motion to quash and ultimately to compel the attendance of third-party witnesses found in Texas, subject to reasonable compensation.

Volkswagen asserts that the district court's analysis falls short. We agree. A proper venue that does enjoy *absolute* subpoena power for both depositions and trial—the Dallas Division—is available. As we noted above, and as § 1404 clearly indicates, venue transfer analysis is concerned with convenience. That the district court can deny any motions to quash does not address concerns regarding the convenience of parties and witnesses. Indeed, this rationale simply asserts that a district court, at some burden to the parties, will likely be able to enforce an option that is inconvenient to witnesses. This factor, then, also weighs in favor of transfer.

The third private interest factor is the cost of attendance for willing witnesses. The district court noted that Volkswagen did not submit sufficient information for the court to determine which of its witnesses were "key" witnesses whose convenience was more important. The district court also noted that given

the proximity of Dallas, where all witnesses reside, to the Marshall Division, the cost of having witnesses attend a trial in Marshall would be minimal. The district court consequently found that this factor does not weigh in favor of transfer.

Volkswagen, however, submitted a list of potential witnesses that included the third-party defendant, accident witnesses, accident investigators, treating medical personnel, and the medical examiner—all of whom reside in Dallas. Volkswagen also submitted two affidavits, one from an accident witness and the other from the accident investigator, that stated that traveling to the Marshall Division would be inconvenient. Volkswagen also asserts that the testimony of these witnesses, including an accident witness and an accident investigator, is critical to determining causation and liability in this case. It would certainly appear that these witnesses are important to Volkswagen's case.

In *In re Volkswagen I* we set a 100-mile threshold as follows: "When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." 371 F.3d at 204-05.[5] We said, further, that it is an "obvious

5. The Singletons argue that *Jarvis Christian Coll. v. Exxon Corp.* indicates that 150 miles is not substantial. 845 F.2d 523, 528 (5th Cir.1988). In *Jarvis Christian*, this court declined to vacate a venue transfer because the *defendant* would have had to travel 203 miles. *Id. Jarvis Christian* did not discuss *witness* inconvenience.

conclusion" that it is more convenient for witnesses to testify at home and that "[a]dditional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which fact witnesses must be away from their regular employment." *Id.* at 205. The district court abused its discretion by ignoring the 100-mile rule. The court did note, however, that Dallas is approximately 155 miles from the Marshall Division. Given the rule established in *In re Volkswagen I*, it is clear that this factor favors transfer.

2.

The only contested public interest factor is the local interest in having localized interests decided at home. Regarding this factor, the district court stated: "There is a local interest in resolving this litigation among the residents of the Dallas Division . . . because the automobile accident occurred there. Furthermore, because the Defendant has brought a third-party claim against . . . [a Dallas resident], residents of the Dallas Division . . . have an interest in a case involving one of their fellow residents that arose out of an accident within the [Dallas] Division. As the Plaintiffs point out, however, the citizens of Marshall also have an interest in this product liability case because the product is available in Marshall. Therefore, this factor is neutral."

Further, with respect to the unfairness of burdening citizens in an unrelated forum with jury duty,[6] the district court noted that although the accident occurred in the Dallas Division, the citizens of Marshall would be interested to know whether there are defective products offered for sale in close proximity to the Marshall Division and whether they are being exposed to these products. The district court therefore held that this factor weighs against transfer.

These findings stand in stark contrast to our analysis in *In re Volkswagen I*. There, under virtually indistinguishable facts, we held that this factor weighed heavily in favor of transfer. *In re Volkswagen I*, 371 F.3d at 205-06. Here again, this factor weighs heavily in favor

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6. The private and public interest factors that we have adopted for venue transfer analysis were first presented in a forum non conveniens case. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (listing the same factors for forum non conveniens analysis). As presented in *Gilbert* and *Piper Aircraft*, the public interest factors included a factor not reflected in all of the opinions of this court: the unfairness of burdening citizens in an unrelated forum with jury duty. *See Gulf Oil*, 330 U.S. at 508-09, 67 S.Ct. 839; *see also Piper Aircraft*, 454 U.S. at 241 n. 6, 102 S.Ct. 252. We have, however, acknowledged that this concern is relevant to § 1404(a) analysis. *Koehring Co. v. Hyde Constr. Co.*, 324 F.2d 295, 296 (5th Cir.1963) (noting that "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation"); *In re Volkswagen I*, 371 F.3d at 206 (same). We now incorporate this concern into the factor now under consideration.

of transfer: the accident occurred in the Dallas Division,[7] the witnesses of the accident live and are employed in the Dallas Division, Dallas police and paramedics responded and took action, the Volkswagen Golf was purchased in Dallas County, the wreckage and all other evidence are located in Dallas County, two of the three plaintiffs live in the Dallas Division (the third lives in Kansas), and the third-party defendant lives in the Dallas Division. Indeed, there is no relevant factual connection to the Marshall Division.

The district court's provided rationales—that the citizens of Marshall have an interest in this product liability case because the product is available in Marshall, and that for this reason jury duty would be no burden—stretch logic in a manner that eviscerates the public interest that this factor attempts to capture. The district court's provided rationales could apply to virtually any judicial district and division in the United States; they leave no room for consideration of those actually affected—directly and indirectly—by the controversies and events giving rise to a case. Thus, the district court committed a clear abuse of discretion.[8]

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7. The district court, introducing a distinct factor not provided by this court's § 1404(a) cases, noted that the place of the alleged wrong is in the Dallas Division and that this factor weighed slightly in favor of transfer. The place of the alleged wrong is a consideration that properly can be considered within the analysis of the local interest in having localized interests decided at home.

8. *In re Volkswagen I* spoke directly to this in finding abuse of discretion and granting mandamus against a refusal to

(Cont'd)

Moreover, the facts do not favor the logic presented. The record indicates that the Volkswagen Golf was purchased from a location in the Dallas Division, and that Marshall, Texas, has no Volkswagen dealership. But again, the larger point is the one we emphasize: that a product is available within a given jurisdiction is insufficient to neutralize the legitimate local interest in adjudicating local disputes.

IV.

Having considered each of the relevant private and public interest factors, we hold that, under a proper application of these factors, no relevant factor favors the Singletons' chosen forum. Further, and for the reasons given above, we hold that the district court

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(Cont'd)

transfer venue: "Plaintiffs have failed to demonstrate and the Eastern District Court has failed to explain how the citizens of the Eastern District of Texas, where there is no factual connection with the events of this case, have more of a localized interest in adjudicating this proceeding than the citizens of the [transferee district], where the accident occurred and where the entirety of the witnesses for the third-party complaint can be located. Arguably, if Plaintiffs had alleged that the Volkswagen vehicle was purchased from a Volkswagen dealer in Marshall, Texas, the people of that community might have had some relation, although attenuated, to this litigation; but as it stands, *there is absolutely nothing in this record to indicate that the people of Marshall, or even of the Eastern District of Texas, have any meaningful connection or relationship with the circumstances of these claims.*" 371 F.3d at 206 (emphasis added).

abused its discretion by failing to order transfer of this case. The petition for mandamus is GRANTED and the case is REMANDED with instructions that it be transferred to the Northern District of Texas, Dallas Division.

PETITION FOR MANDAMUS
GRANTED and CASE REMANDED
WITH INSTRUCTIONS.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED FEBRUARY 13, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-40058

In re: VOLKSWAGEN OF AMERICA INC, a New Jersey Corporation; Volkswagen AG, a foreign corporation organized under the laws of Germany,

Petitioners.

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas, Marshall.

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

PER CURIAM:*

Petitioners Volkswagen AG and Volkswagen of America, Inc. (collectively, "Volkswagen") seek a writ of mandamus, contending that the district court abused its discretion in denying Volkswagen's motion to transfer venue from the Marshall Division of the Eastern District

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of Texas to the Dallas Division of the Northern District of Texas.

"Mandamus is an extraordinary writ . . . and is not a substitute for an appeal. We will issue the writ only . . . when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re Chesson*, 897 F.2d 156, 159 (5th Cir.1990). Further, "[t]he district court has broad discretion in deciding whether to order a [venue] transfer." *Caldwell v. Palmetto State Sav. Bank*, 811 F.2d 916, 919 (5th Cir.1987).

Although Volkswagen argues that this case "presents a virtual replay" of a case in which the writ was issued to correct errors in a district court's venue transfer analysis, *In re Volkswagen AG*, 371 F.3d 201 (5th Cir.2004), that case is distinct. First, the district court in *In re Volkswagen* improperly failed to consider the convenience of parties and witnesses to the defendants' third-party claims. *Id.* at 204-05. By contrast, the court here did not exclude the convenience of any party or witness from its consideration. Second, the approximately 400 miles that the parties and witnesses in *In re Volkswagen* would have had to travel to reach the plaintiffs' chosen venue is far greater than the roughly 150 miles involved here. Third, the court in *In re Volkswagen* determined that the third-party defendant would be inconvenienced by having to travel that distance, *id.*, whereas the third-party defendant in

this case has stated that maintenance of the action in the Marshall Division of the Eastern District of Texas is not inconvenient. Finally, the *In re Volkswagen* court erred by considering the convenience of counsel, *id.* at 206, which is not a proper factor in the venue transfer analysis and was not considered in this case.

The district court here did not clearly and indisputably abuse its discretion in denying Volkswagen's motion to transfer venue, and we are thus unwilling to substitute our own balancing of the transfer factors for that of the district court.

IT IS ORDERED that the petition for writ of mandamus is DENIED.

Appendix C

EMILIO M. GARZA, Circuit Judge, dissenting:

Because the Eastern District of Texas has no 28 U.S.C. § 1404(a) connection or relationship with the circumstances of these claims, I respectfully dissent. A transfer of venue is proper when a set of private and public interest factors weigh in favor of transfer. *In re Volkswagen*, 371 F.3d 201, 203 (2004); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). Even though the district judge considered the proper factors, he still abused his discretion in balancing them. *See id.* The only connection between this case and the Eastern District of Texas is plaintiffs' choice to file there; *all* other factors relevant to transfer of venue weigh overwhelmingly in favor of the Northern District of Texas. *See In re Horseshoe Entm't*, 337 F.3d 429, 435 (5th Cir.2003) ("[T]he factors favoring transfer substantially out weigh the single factor of the place where plaintiff chose to file the suit"); *see also Volkswagen*, 371 F.3d at 203. Moreover, the fact that parties and witnesses will travel 150 miles to litigate their claims does not weigh against transfer. *See Volkswagen*, 371 F.3d at 204-05 ("When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.").

APPENDIX D — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, MARSHALL DIVISION, FILED DECEMBER 7, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Civil Action No. 2-06-CV-222 (TJW)

RICHARD SINGLETON, RUTH SINGLETON, AMY SINGLETON, Individually and as Representative of THE ESTATE OF MARIANA SINGLETON, a Deceased Minor,

Plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation; and VOLKSWAGEN, A.G., a foreign Corporation organized under the laws of Germany,

Defendants and
Third-Party Plaintiff

v.

Colin R. Little,

Third-Party Defendant.

Appendix D

MEMORANDUM ORDER

Before the Court is Volkswagen of America, Inc.'s ("VWOA") Motion for Reconsideration of the Court's Memorandum and Order denying VWOA's Motion to Transfer Venue (# 23). After carefully considering the parties' filings, the motion is DENIED.

I. Introduction

This products liability action arises out of alleged injuries sustained by the plaintiffs as the result of an automobile accident. On May 21, 2005, the plaintiffs, residents of Collin County, Texas, were in a 1999 Volkswagen Golf being driven by Ruth Singleton when it was struck in the rear by a 1999 Chrysler 300 driven by Colin R. Little. As a result of the impact, the 1999 Volkswagen Golf spun around and struck the rear of a flat-bed trailer, owned by Skinner Nurseries of Denton County, Texas, parked on the shoulder. The two passengers in the Volkswagen, Richard and Mariana Singleton, received serious injuries. Mariana Singleton died after being transported to a hospital. The plaintiffs contend that Defendant Volkswagen of America, Inc. ("VWOA") is responsible for their injuries as a result of the alleged defective design of the passenger seat and seat assembly of the 1999 Volkswagen Golf.

On May 30, 2006, the plaintiffs filed suit in this court, asserting claims of strict liability, breach of warranty, and negligence against VWOA and Volkswagen, A.G. VWOA is a subsidiary of Volkswagen, A.G., and a

corporation organized under New Jersey law. Volkwagen, A.G. is a German corporation. VWOA requests this Court to reconsider its denial of VWOA's motion to transfer to the Dallas Division of the Northern District of Texas pursuant to 28 U.S.C. § 1404(a).

II. Analysis

VWOA requests the Court reconsider five factors in its analysis to transfer venue—1) Plaintiffs' choice of forum, 2) Convenience of non-party witnesses, 3) the Court's subpoena power, 4) Place of alleged wrong, and 5) Local interest in this case.

A. Plaintiffs' Choice of Forum

Plaintiffs were residents of the Eastern District of Texas at the time of the accident. Contrary to VWOA's assertion, "decisive weight" was not given to Plaintiffs' choice of forum. Plaintiffs' choice of forum was a factor considered to weigh against transfer. *See In re Horseshoe Entm't*, 337 F.3d 429, 434 (5th Cir.2003).

B. Convenience of Non-Party Witnesses

The distance from Dallas to Marshall is approximately 155 miles, which is only 2 or 2 1/2 hours one-way. This is not substantial and, therefore, this factor does not weigh in favor of transfer.

C. Court's Subpoena Power

The Court's subpoena power extends to any witness residing in the state in which the court sits. *See* Fed.R.Civ.P. 45(c)(3)(A)(ii). The Court's subpoena power of non-party witnesses required to travel more than 100 miles is subject to a motion to quash or modification if the witness incurs substantial expense. *See id.;* Fed.R.Civ.P. 45(c)(3)(B)(iii). VWOA does not contend that travel from Dallas to Marshall by non-party witnesses would incur substantial expense. Accordingly, this factor does not weigh in favor of transfer.

D. Place of Alleged Wrong

Although the accident took place in the Northern District of Texas, the case brought by Plaintiffs against VWOA is a products liability action. Many of the alleged wrongs took place outside of the Northern District of Texas, and, therefore, this factor slightly weighs in favor of transfer.

E. Local Interest

VWOA argues that this accident occurred in, and involves a resident of, the Northern District of Texas. However, it also involves residents of the Eastern District of Texas, and, therefore, the citizens of this district would have an interest in this case. Furthermore, the citizens of this district would also be interested to know whether there are defective products offered for sale in close proximity to the Marshall Division and

whether they are being exposed to these products. Accordingly, this factor is neutral as to transfer.

III. Conclusion

The Court remains persuaded that denial of the motion to transfer venue to the Northern District of Texas was proper, notwithstanding VWOA's challenges to the contrary. Accordingly, the VWOA's motion for reconsideration is DENIED.

SIGNED this 7th day of December, 2006.

s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, MARSHALL DIVISION, FILED SEPTEMBER 12, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

Civil Action No. 2-06-CV-222 (TJW)

RICHARD SINGLETON, RUTH SINGLETON, AMY SINGLETON, Individually and as Representative of THE ESTATE OF MARIANA SINGLETON, Deceased Minor,

Plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation; and VOLKSWAGEN, A.G., a foreign Corporation organized under the laws of Germany,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Volkswagen of America, Inc.'s Motion to Transfer Venue (Doc. No. 3). After considering the filings of the parties and the applicable law, the Court ORDERS that the defendant's motion be DENIED for the reasons expressed below.

Appendix E

I. Factual Background

This products liability action arises out of alleged injuries sustained by the plaintiffs as the result of an automobile accident. On May 21, 2005, the plaintiffs, residents of Collin County, Texas, were in a 1999 Volkswagen Golf being driven by Ruth Singleton when it was struck in the rear by a 1999 Chrysler 300 driven by Colin R. Little. As a result of the impact, the 1999 Volkswagen Golf spun around and struck the rear of a flat-bed trailer, owned by Skinner Nurseries of Denton County, Texas, parked on the shoulder. The two passengers in the Volkswagen, Richard and Mariana Singleton, received serious injuries. Mariana Singleton died after being transported to a hospital. The plaintiffs contend that Defendant Volkswagen of America, Inc. ("VWOA") is responsible for their injuries as a result of the alleged defective design of the passenger seat and seat assembly of the 1999 Volkswagen Golf.

On May 30, 2006, the plaintiffs filed suit in this court, asserting claims of strict liability, breach of warranty, and negligence against VWOA and Volkswagen, A.G. VWOA is a subsidiary of Volkswagen, A.G., and a corporation organized under New Jersey law. Volkwagen, A.G. is a German corporation. VWOA seeks to have this action transferred to the Dallas Division of the Northern District of Texas pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses.

II. Discussion

Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any district or division where it might have been brought." 28 U.S.C. § 1404(a) (2004). It is within the district court's sound discretion whether to transfer venue under section 1404(a). *Mohamed v. Mazda Corp.*, 90 F.Supp.2d 757, 768 (E.D.Tex.2000). When considering whether to transfer venue, the district court "must exercise its discretion in light of the particular circumstances of the case." *Hanby v. Shell Oil Co.*, 144 F.Supp.2d 673, 676 (E.D.Tex.2001); *In re Triton Ltd. Sec. Litig.*, 70 F.Supp.2d 678, 688 (E.D.Tex.1999) (stating that district courts have the discretion to decide whether to transfer venue according to "individualized, case-by-case consideration of convenience and fairness").

Under Section 1404(a), the analysis remains the same regardless of whether the party moves for *inter* or *intra* district transfer. *Mohamed*, 90 F.Supp.2d at 768. When deciding whether to transfer venue, the court balances the following two categories of interests: "(1) the convenience of the litigants, and (2) the public interests in the fair and efficient administration of justice." *Hanby*, 144 F.Supp.2d at 676. The convenience factors weighed by the district court are the following: (1) the plaintiff's choice of forum; (2) the convenience of the parties and material witnesses; (3) the place of the alleged wrong; (4) the cost of obtaining the attendance of witnesses and the availability of the compulsory

process; (5) the accessibility and location of sources of proof; and (6) the possibility of delay and prejudice if transfer is granted. *Mohamed*, 90 F.Supp.2d at 771. The court also balances the following public interest factors: (1) the administrative difficulties caused by court congestion; (2) the local interest in adjudicating local disputes; (3) the unfairness of burdening citizens in an unrelated forum with jury duty; and (4) the avoidance of unnecessary problems in conflict of laws. *Id.* The moving party bears the burden of demonstrating that venue should be transferred to another forum. *Hanby*, 144 F.Supp.2d at 676. To meet this burden, the moving party must show that "the balance of convenience and justice *substantially* weighs in favor of transfer." *Mohamed*, 90 F.Supp.2d at 768.

A. Convenience Factors

1. The plaintiff's choice of forum

The plaintiff's choice of forum is "a paramount consideration in any determination of [a] transfer request, and that choice should not be lightly disturbed." *In re Triton Ltd. Sec. Litig.*, 70 F.Supp.2d 678, 688 (E.D.Tex.1999) (quoting *Young v. Armstrong World Indus.*, 601 F.Supp. 399, 401 (N.D.Tex.1984)). The plaintiff's choice of forum will not be disturbed unless it is clearly outweighed by other factors. *Shoemake v. Union Pac. R.R. Co.*, 233 F.Supp.2d 828, 830 (E.D.Tex.2002). In a diversity action, such as this, venue is proper in a judicial district in which "any defendant resides." 28 U.S.C. § 1391(a)(1) (2005). When the

defendant is a corporation, the corporation is "deemed to reside in any district in that State within which its contacts would be sufficient to be subject it to personal jurisdiction. . . ." 28 U.S.C. § 1391(c) (2005). In this case, the Plaintiffs' choice of forum is the Marshall Division of the Eastern District of Texas. Venue is proper in the Eastern District of Texas because there is no question that VWOA, a corporation licensed to do business in the State of Texas, is subject to the personal jurisdiction of this District. Furthermore, venue is proper in any division in this District.

2. The convenience of parties and material witnesses

The Court will first assess the convenience of the parties. In assessing the convenience of parties, third-party defendants are parties whose convenience must also be considered. *In re Volkswagen*, 371 F.3d 201, 204 (5th Cir.2004) (stating that "nothing in § 1404(a) . . . limits the application of the terms 'parties' and 'witnesses' to those involved in an original complaint ."). The convenience of the parties is accorded less weight in a transfer analysis than the convenience of nonparty witnesses. *Shoemake*, 233 F.Supp.2d at 832. In this case, the Defendants include a foreign corporation based in Germany and its subsidiary organized under the laws of New Jersey. The Defendants will be inconvenienced regardless of whether the case is transferred. On the other hand, at the time of the accident, the Plaintiffs resided in Plano, Collin County, Texas, and Mr. Little, the third-party defendant, resided in Garland, Dallas

County, Texas. The distance between Plano and Marshall is approximately 153 miles, and the distance from Garland to Marshall is approximately 150 miles. Neither distance is far enough to weigh substantially in favor of a transfer. In the Court's view, the convenience of the parties does not weigh in favor of transfer.

The Court now considers the convenience of the witnesses. Generally, in a venue transfer analysis, the most important factor considered is whether "key fact witnesses" will be substantially inconvenienced if the court should deny transfer. *Mohamed,* 90 F.Supp.2d at 774. Further, the convenience of non-party witnesses weighs more heavily in favor of transfer than the convenience of party witnesses. *Shoemake,* 233 F.Supp.2d at 832. The moving party must "specifically identify key witnesses and outline the substance of their testimony." *Mohamed,* 90 F.Supp.2d at 775 (quoting *Hupp v. Siroflex of America, Inc.,* 848 F.Supp. 744, 749 (S.D.Tex.1994)).

In its moving papers, the Defendant has submitted a list of potential witnesses who all live and work in Dallas County or the Dallas area. *Defendant's Motion to Transfer Venue ("Defendant's Motion")* at 7. These witnesses include the third-party defendant, accident witnesses, accident investigators, treating medical personnel, and the medical examiner. Further, the Defendant has submitted two affidavits, one from an accident witness and the other from the accident investigator, stating their inconvenience of traveling to Marshall. *See Exhibits 4 and 5 attached to Defendant's*

Motion. However, the Defendant did not explain why all of these witnesses are actually material to its case. Further, the Defendant did not outline the substance of these witnesses' testimony. With such scant information about these individuals, the Court cannot determine that they are indeed key fact witnesses whose convenience should be assessed in this analysis. Nevertheless, after considering the convenience of the witnesses, the Court finds that the convenience of non-party witnesses does not weigh in favor of transfer. The Defendant has not shown that its material, nonparty witnesses will be *substantially* inconvenienced if the Court denies transfer. The Defendant submits to the Court that Dallas is approximately 155 miles from Marshall. *See Exhibit 3 attached to Defendant's Motion.* This distance, however, is not substantial. *Mohamed,* 90 F.Supp.2d at 776 (stating that "[g]iven the advances in transportation and communication, the [150 mile] distance between Marshall and Dallas is negligible.") This case is not analogous to *In re Volkswagen* where the non-party witnesses would have had to drive or fly a distance of approximately 400 miles to Marshall. *In re Volkswagen,* 371 F.3d at 204.

3. The place of the alleged wrong

It is undisputed that the alleged accident occurred in Dallas County, Texas, which is within the Dallas Division of the Northern District of Texas. However, the location of the product design and manufacture are also relevant, and occurred outside the Northern District of Texas. This factor weighs only slightly in favor of transfer.

4. The cost of obtaining the attendance of witnesses and the availability of compulsory process

In its moving papers, the Defendant states that the cost of bringing non-party and non-expert witnesses to Marshall would include time and money. *Defendant's Motion* at 8. Given the proximity of Dallas to Marshall, the cost of having these witnesses attend a trial in Marshall would be minimal. *Mohamed*, 90 F.Supp.2d at 776 (stating that this Court will not "transfer a federal lawsuit for the sole reason of preventing a two-and-a-half hour drive by a few witnesses.") Thus, the cost of obtaining the attendance of witnesses does not weigh in favor of transfer.

The Defendant also states that all of the witnesses are outside of this Court's subpoena power because they reside more than one hundred miles from Marshall. *Defendant's Motion* at 8. The Defendant misconstrues the subpoena power of this Court. A court may compel any witness residing in the state in which the court sits to attend trial, subject to reasonable compensation if the witness incurs substantial expense. *See* Fed.R.Civ.P. 45(c)(3). Under this rule, this Court's subpoena power extends to all of the witnesses listed by the Defendant because they all reside in the State of Texas. Therefore, this factor does not weigh in favor of transfer.

5. The accessibility and location of sources of proof

The Court notes that this factor has become less significant in a transfer analysis because of the advances in copying technology and information storage. *Mohamed*, 90 F.Supp.2d at 778. The Defendant argues that the evidence is more easily accessible from the Dallas Division of the Northern District of Texas because all of the documents and physical evidence relating to the accident, and other documents are in or near Dallas County. *Defendant's Motion* at 8. Any documents or evidence can be easily transported to Marshall. In the Court's view, this factor does not weigh in favor of transfer.

6. The possibility of delay and prejudice if transfer is granted

The Fifth Circuit has suggested that this factor may be relevant in a transfer analysis "only in rare and special circumstances and when such circumstances are established by clear and convincing evidence." *Shoemake*, 233 F.Supp.2d at 834 (citing *In re Horseshoe Entm't*, 305 F.3d 354, 358 (5th Cir.2002)). Because it is early in the litigation, the Plaintiffs would not be prejudiced by a transfer. *Ledoux v. Isle of Capri Casinos, Inc.*, 218 F.Supp.2d 835, 838 (E.D.Tex.2002). Therefore, this factor is neutral. *Id.*

Appendix E

B. Public Interest Factors

1. The administrative difficulties caused by court congestion

The Court should consider any administrative difficulties caused by court congestion in its transfer analysis. In its moving papers, Defendant states that both the Dallas Division of the Northern District and the Marshall Division of the Eastern District "move cases along with relative promptness." *Defendant's Motion* at 10. After considering this factor, the Court is not persuaded that it weighs in favor of transfer.

2. The local interest in adjudicating local disputes

There is a local interest in resolving this litigation among the residents of the Dallas Division of the Northern District of Texas because the automobile accident occurred there. Furthermore, because the Defendant has brought a third-party claim against Colin Little, residents of the Dallas Division of the Northern District of Texas have an interest in a case involving one of their fellow residents that arose out of an accident within the Division. As the Plaintiffs point out, however, the citizens of Marshall also have an interest in this product liability case because the product is available in Marshall. *Plaintiffs' Response to Defendant's Motion to Transfer Venue* at 10-11. Therefore, this factor is neutral.

Appendix E

3. The unfairness of burdening citizens in an unrelated forum with jury duty

Defendant contends that the residents of the Marshall Division should not be burdened with the jury duty and resolution of this dispute. *Defendant's Motion* at 10-11. Although the accident occurred in the Dallas Division of the Northern District of Texas, the Plaintiff's product liability claims against the Defendant are related to the Marshall Division. The citizens of Marshall would be interested to know whether there are defective products offered for sale in close proximity to the Marshall Division and whether they are being exposed to these products. *See Mohamed v. Mazda Motor Corp.*, 90 F.Supp.2d 757, 780 (E.D.Tex.2000). Therefore, this factor weighs against transfer.

4. The avoidance of unnecessary problems in conflict of laws

The plaintiffs assert products liability, breach of warranty, and negligence claims that arise under Texas law, and the defendant seeks a transfer between two federal district courts within the State of Texas. Consequently, the Court finds that this factor is inapplicable in this transfer analysis.

III. Conclusion

The Court has considered the applicable factors under 28 U.S.C. § 1404(a). Although some factors weigh in favor of a transfer, others do not. The Defendant has not satisfied its burden of showing that the balance of convenience and justice substantially weighs in favor of transfer in this case. Upon application of the section 1404(a) factors to this case, the Court has exercised its discretion and has concluded that transfer to the Dallas Division of the Northern District of Texas is not warranted. Accordingly, the Court **DENIES** the Defendant's Motion to Transfer Venue.

SIGNED this 11th day of September, 2006.

s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

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(3)

No. 08-754

Supreme Court, U.S.
FILED
JAN 12 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICHARD SINGLETON, RUTH SINGLETON, and AMY SINGLETON,

Petitioners,

v.

VOLKSWAGEN AG and VOLKSWAGEN OF AMERICA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the *en banc* Fifth Circuit properly exercised its discretion in granting a writ of mandamus for failure to transfer a case under 28 U.S.C. § 1404(a) where, as the Fifth Circuit observed, the district court "gave undue weight to the Plaintiffs' choice of venue, ignored our precedents, misapplied the law, and misapprehended the relevant facts."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Volkswagen AG and Volkswagen of America, Inc. state the following:

Volkswagen of America, Inc., now known as Volkswagen Group of America, Inc., is a wholly owned subsidiary of Volkswagen AG. Porsche Automobil Holding SE, a public company, owns more than 10% of Volkswagen AG's stock.

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15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3855 (3d ed. 2007) 13-14

17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 111.13[1][c][iii] (3d ed. 1997) 17

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INTRODUCTION

Petitioners ask the Court to review whether a court of appeals may reverse the venue transfer decision of a district court in the "absence of any action by the district court beyond its power or jurisdiction." Pet. at i. But neither that question nor anything like it is presented in this case. Petitioners' description of the case sidesteps the actual basis for the Fifth Circuit's grant of mandamus here—*viz.*, a series of grave and recurring legal errors committed by the district court in its interpretation and application of 28 U.S.C. § 1404(a).

The Fifth Circuit, sitting *en banc*, did not grant mandamus in this case based on mere "run-of-the-mill differences in judgment of the sort that can split any two judges or courts." Pet. at 18. Nor did it grant mandamus based on some "nuanced" or "prosaic" disagreement with the district court's analysis of the facts relevant to transfer. Pet. at 17-18. Rather, the *en banc* court issued the writ because the district court committed multiple errors of law, including:

(i) erroneously "consider[ing] the plaintiffs' choice of venue as an independent factor within the venue transfer analysis," despite Supreme Court and Fifth Circuit precedent establishing that "a plaintiff's choice of forum . . . is not an independent factor within the *forum non conveniens* or the § 1404(a) analysis." App. at 19a;

(ii) incorrectly "applying the stricter *forum non conveniens* dismissal standard and thus giving inordinate weight to the plaintiffs' choice of venue." App. at 20a; and

(iii) impermissibly "disregarding the specific precedents of" the Fifth Circuit, especially *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*In re Volkswagen I*"), a substantially similar case involving the same district court, the same legal issues and, indeed, the same defendant. App. at 28a.

The presence of these fundamental errors wholly undermines Petitioners' claim that the Fifth Circuit granted mandamus "simply because it disagreed with how the district court analyzed and weighed the [§ 1404(a)] factors, and with the outcome of its discretionary balancing." Pet. at 3. As the *en banc* court held, the presence of these extraordinary legal errors produced "a patently erroneous result" warranting correction by mandamus. App. at 28a-29a. Even by Petitioners' account, the use of mandamus in such situations "is not controversial." Pet. at 11.

While circuit courts have employed different verbal formulations of the standard for mandamus under § 1404(a)—and certainly have expressed disagreement about the use of mandamus in § 1404(a) cases at the margins—those differences are wholly immaterial to the issues in this case and thus raise nothing warranting

this Court's plenary review. *See* EUGENE GRESSMAN, *et al.*, SUPREME COURT PRACTICE at 248 (9th ed. 2007) (citing *Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied despite existence of circuit conflict where petitioner would be liable regardless of how conflict was resolved)). Because *all* circuits endorse use of the writ in the face of legal error, there simply is no split among the circuits pertinent to the resolution of this case.

Beyond that, employing mandamus to prevent a pattern of persistent or repeated error by a district court is critical to the supervisory authority of the courts of appeals, and has been expressly authorized by this Court. No case establishes that a district court may fail to follow binding circuit court precedent in making a § 1404(a) transfer decision. There is thus no division of authority even arguably warranting review in this case.

STATEMENT OF THE CASE

A. Factual Background

On the morning of Saturday, May 21, 2005, Dallas County resident Colin Little was traveling at highway speeds on Interstate 635 in Dallas when his Chrysler 300 struck the left rear of a Volkswagen Golf driven by Ruth Singleton. App. at 2a; VW App. at 16a, 28a-30a.[1] The collision spun the Golf around and propelled its left rear quarter into a flat-bed trailer parked along the

[1] Citations to "VW App." are to the evidentiary appendix that Volkswagen filed in the court of appeals in support of its petition for writ of mandamus. The Singletons cite to this appendix extensively in their Petition.

shoulder of the freeway.[2] App. at 2a, 50a. These two separate and violent rear impacts caused extensive damage to the Golf and catastrophically injured two passengers, Richard Singleton and Mariana Singleton. App. at 2a, 50a; VW App. at 29a. Dallas County residents witnessed the accident. App. at 3a, 51a; VW App. 65a-67a. Dallas emergency personnel responded at the scene and transported Richard and Mariana to Dallas hospitals for treatment. App. at 3a, 51a; VW App. at 30a. Mariana, a seven year old, died from her injuries at Children's Medical Center in Dallas. An autopsy was performed on her by a Dallas physician. App. at 3a, 51a; VW App. at 28a-30a. Richard Singleton was treated at Parkland Hospital in Dallas. VW App. at 4a. Dallas police investigated the accident and filed reports in their offices. App. at 3a, 51a; VW App. at 46a-59a, 63a-64a. The damaged Volkswagen Golf—which Mariana's mother, Amy Singleton, purchased from a Dallas County dealership—App. at 3a, 51a; VW App. at 28a, 45a—is now and has been held as evidence in Dallas County.

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[2] In an effort to identify some connection between this case and their preferred venue, Petitioners point out that "[t]he trailer was owned by a local nursery located in Denton County, also adjacent to Dallas County and in the Eastern District, and was driven by its employee." Pet. at 5. What Petitioners fail to note is that the "employee," John Soto, was a resident of Dallas County in the Northern District of Texas. Mr. Soto had parked along the freeway shoulder to assist his wife, Irene Soto, in changing a flat tire on her vehicle. VW App. at 61a, 129a-131a. Mr. and Mrs. Soto are the two eye-witnesses to the accident, and they both reside in Dallas County in the Northern District of Texas. Mrs. Soto submitted an affidavit stating that it would be an "unreasonable burden and hardship" and an "inconvenience" for her "to be required to travel 160 miles from [her] residence to Marshall, Texas to testify in a trial of this matter." VW App. 65a-67a.

B. Proceedings in the District Court

Petitioners did not sue the driver who struck them, Mr. Little. Nor did they sue in the Northern District of Texas where the accident occurred. Instead, they filed suit against Volkswagen some 155 miles away near the Texas-Louisiana border in the Marshall Division of the Eastern District of Texas, alleging that improper seat design caused the injuries to Richard and Mariana Singleton.

Contrary to the impression conveyed in the Petition (at 5-6), the Eastern District of Texas was *not* the home of any of the Petitioners at the time that they filed suit, or at any point during this litigation. Although Petitioners previously had lived in the Dallas suburb of Plano, which falls within the Sherman Division of the Eastern District of Texas, two of the Petitioners are residents of Dallas in the Northern District of Texas, while the third Petitioner is a resident of Kansas. App. at 26a; VW App. at 16a, 23a, 60a-62a, 145a-149a. No party or known witness has ever resided in the Marshall Division of the Eastern District of Texas.[3]

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[3] Petitioners assert, with no evidence, that "Mariana's teachers, neighbors and friends, who could provide damages-related testimony about her life, reside in the Eastern District in Collin County." Pet. at 6. This hypothetical set of suburban Dallas witnesses in no way supports the relative convenience of Marshall over Dallas. Any of Mariana Singleton's Plano-based "teachers, neighbors and friends" obviously would find it far more convenient to attend a trial in the immediately adjacent city of Dallas (less than 20 miles away), rather than traveling 155 miles into rural East Texas to testify in Marshall.

In response to the Singletons' suit against it, Volkswagen promptly joined Little as a responsible third party. App. 3a; VW App. at 102a-105a. Under Texas' comparative fault scheme, the facts regarding both Mr. Little's actions and the resulting accident are of critical importance to Volkswagen's defense that Mr. Little's negligent acts, rather than any alleged design defect, were directly and exclusively responsible for the injuries suffered by Petitioners.[4]

After adding Mr. Little as a third-party defendant, Volkswagen moved, pursuant to 28 U.S.C. § 1404(a), to transfer venue to the Dallas Division of the Northern District of Texas as the clearly more convenient forum. App. at 3a; VW App. at 14a-26a and 27a-69a. In its motion, Volkswagen explained and presented evidence that none of the parties or witnesses reside in the Eastern District, none of the relevant events took place there, no evidence is stored there, and no party or relevant witness has any connection to the Marshall Division. VW App. at 14a-15a. The only connection between this case and the Marshall Division is that Plaintiffs chose to file suit there. VW App. 18a-19a.

The district court denied Volkswagen's motion to transfer, holding that "[t]he plaintiff's choice of forum is a 'paramount consideration in any determination of [a] transfer request, and that choice should not be lightly disturbed.'" App. at 85a. Volkswagen promptly sought

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[4] In view of Volkswagen's comparative fault defense, Petitioners' suggestion that "the basic facts of how the collision occurred" are neither "contested" nor particularly relevant is misleading. Pet. at 4.

reconsideration (VW App. at 106a-136a), which the district court also denied. App. at 78a-81a.

C. Proceedings in the Court of Appeals

Volkswagen petitioned the Fifth Circuit for a writ of mandamus. On February 13, 2007, in a 2-1 decision, a panel of the Fifth Circuit declined to grant mandamus. *In re Volkswagen of Am. Inc.*, 223 F. App'x 305 (5th Cir. 2007) (App. at 73a-75a). Volkswagen filed a petition for rehearing *en banc*. On April 23, 2007, the original panel treated the petition for rehearing *en banc* as a petition for panel rehearing, granted it, withdrew its decision, and directed the petition to be scheduled for argument. Following oral argument, a second panel of the Fifth Circuit voted unanimously to grant the writ. *In re Volkswagen of Am. Inc.*, 506 F.3d 376 (5th Cir. 2007) (App. 49a-75a). The Singletons then successfully petitioned for rehearing *en banc*. On October 10, 2008, the *en banc* Fifth Circuit issued a 10-7 decision granting the writ of mandamus and ordering this case transferred from the Marshall Division of the Eastern District of Texas to the Dallas Division of the Northern District of Texas. *In re Volkswagen of Am. Inc.*, 545 F.3d 304 (5th Cir. 2008) (App. 1a-48a).

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit Faithfully Adhered to This Court's Mandamus Standard, and All Circuits Agree That Mandamus May be Used as a Limited Means to Test a District Court's § 1404(a) Ruling

The Singletons contend that this Court's standard for granting mandamus precludes using the writ to correct a "clear abuse of discretion"—as distinct from a "jurisdictional" error—in the district court's application or interpretation of § 1404(a). Pet. at 15-18. The Singletons also argue that this Court should grant certiorari in order to resolve a purported circuit split concerning the "use of mandamus to address claimed abuses of discretion in [§ 1404(a)] transfer motions." Pet. at 20. Neither argument withstands scrutiny.

A. The Fifth Circuit Followed this Court's Mandamus Standard

The Singletons correctly note that this Court has never specifically held that mandamus is an available remedy in the context of § 1404(a). *See Van Dusen v. Barrack*, 376 U.S. 612, 614-15 (1964) (declining to reach the issue); *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (same). But nor has the Court ever placed the exercise of a district court's discretion under § 1404(a) beyond the confines of mandamus review. Moreover, the Court, as a general matter, has expressly sanctioned use of mandamus in "exceptional circumstances" amounting to "a clear abuse of discretion." *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004). As the Court explained, "[a]lthough we have not limited the use of

mandamus by an unduly narrow and technical understanding of what constitutes a matter of jurisdiction, we have required that petitioners demonstrate a clear abuse of discretion or conduct amounting to the usurpation of the judicial power, to be entitled to the writ." *Mallard v. United States District Ct.*, 490 U.S. 296, 309 (1989) (compiling cases, citations and internal quotation marks omitted). The Singletons are urging a retreat to precisely the sort of "technical understanding of what constitutes a matter of jurisdiction" that this Court rejected in *Mallard*.

Mandamus is proper if the district court either commits a "clear abuse of discretion" or engages in "conduct amounting to the usurpation of the judicial power." *Id.*; *Cheney*, 542 U.S. at 380 (same). This is the exact standard that the Fifth Circuit applied, and that it found Volkswagen satisfied. App. 7a-11a. Confirming its fidelity to this standard, the Fifth Circuit stressed emphatically that "in no case will we replace a district court's exercise of discretion with our own; we review only for clear abuses of discretion that produce patently erroneous results." App. at 14a. Consistent with *Cheney* and *Mallard*, the Fifth Circuit acknowledged throughout its opinion that mandamus is an "extraordinary remedy" and properly imposed the burden on Volkswagen to demonstrate its "clear and indisputable" entitlement to the writ. App. at 10a-11a, 28a; *Cheney*, 542 U.S. at 380-81; *Mallard*, 490 U.S. at 309. The Fifth Circuit correctly articulated and applied this Court's mandamus standard, recognizing that its "'hurdles, however demanding, are not insuperable.'" App. at 11a (quoting *Cheney*, 542 U.S. at 381).

The Singletons make much of the fact that the § 1404(a) determination is committed to the discretion of the district court, contending that this insulates the district court's transfer decision from mandamus regardless of how arbitrary the exercise of that discretion may have been. Pet. at 3 and 17-19. But the mere fact that a district court possesses discretion does not mean that it is unbounded by legal guidelines. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (noting that a decision calling for the exercise of discretion "hardly means that it is unfettered by meaningful standards"); *United States v. Taylor*, 487 U.S. 326, 336 (1988) ("Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise." (quotations and citations omitted)). At a minimum, the trial court's discretion is cabined by the text of the relevant statute—here, § 1404(a)—by precedents of this Court, and by precedents of the relevant circuit court of appeals.

As *Cheney* and *Mallard* establish, a district court can so clearly abuse its discretion as to require correction via mandamus. *Cheney*, 542 U.S. at 380; *Mallard*, 490 U.S. at 309. Nothing in this Court's jurisprudence contains any hint that the use of mandamus by circuit courts to police and correct a trial court's "clear abuse of discretion" is forbidden in the context of § 1404(a). The Tenth Circuit, in fact, has explicitly invoked this Court's decisions to support the conclusion that "[m]andamus is an appropriate remedy to test the validity of the transfer order." *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 692 n.2 (10th Cir. 1965) (citing *Hoffman v. Blaski*, 363 U.S. 335 (1960) and *Van Dusen*, 376 U.S. at 615 n.3).

Contrary to the contention advanced in the Petition (at 15-17), the Court's decisions in *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953), and *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33 (1980), do not establish a different rule. In *Bankers Life*, the Court expressly recognized the propriety of mandamus in "exceptional circumstances where there is a clear abuse of discretion," and held only that the court of appeals correctly declined to grant mandamus "in the circumstances of th[at] case." 346 U.S. at 382. Moreover, *Allied Chemical* involved the wholly unrelated question of whether a district court order granting a new trial could be overturned by mandamus. 449 U.S. at 191.

Despite numerous opportunities to do so over five decades, the Court has never granted certiorari to bar the use of mandamus in the context of § 1404(a). *See, e.g.*, *In re Horseshoe Entm't*, 337 F.3d 429, 431-32 (5th Cir.) (granting mandamus to compel a transfer of venue and "recogniz[ing] the availability of mandamus as a limited means to test the district court's discretion in issuing transfer orders."), *cert. denied*, 540 U.S. 1049 (2003); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002) (holding that "we, like other courts, have held that mandamus is the appropriate mechanism for reviewing an allegedly improper transfer order."), *cert. denied*, 537 U.S. 1148 (2003); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977) (conducting "an inquiry as to 'whether the district court's action under § 1404(a) was shown to be without any possible basis for judgment of discretion, so as legally to involve abuse of judicial power and responsibility.'"), *cert. denied*, 435 U.S. 952 (1978); *Lemon v. Druffel*, 253 F.2d 680, 685 (6th Cir.)

(holding that the court of appeals has power to issue writs of mandamus to correct abuses of discretion under § 1404(a)), *cert. denied*, 358 U.S. 821 (1958); *Chicago, Rock Island & Pac. R.R. v. Igoe*, 220 F.2d 299, 304 (7th Cir.) (*en banc*) (granting a writ of mandamus under § 1404 because "[t]he balance of convenience of the parties is so overwhelmingly in favor of the defendant that we hold the denial by respondent of the motion to transfer this case . . . was so clearly erroneous that it amounted to an abuse of discretion."), *cert. denied*, 350 U.S. 822 (1955). Petitioners have presented no reason for the Court to do so now.

B. All Circuits Recognize the Limited Availability of Mandamus in the Context of § 1404(a)

Nor, upon examination, is the circuit split urged by the Singletons relevant to the decision in this case. While the circuit courts may vary in their formulations of standards and/or their willingness to grant the writ in a given case, they all agree that mandamus may be appropriate in the § 1404(a) context. The *en banc* Fifth Circuit noted exactly this point at the outset of its opinion, citing cases from every court of appeals for the proposition that mandamus is available "as a limited means to test the district court's discretion in issuing transfer orders." App. at 7a, n.3 (citing *In re Sealed Case*, 141 F.3d 337, 340 (D.C. Cir. 1998); *In re Josephson*, 218 F.2d 174, 183 (1st Cir. 1954), *abrogated on other grounds by In re Union Leader Corp.*, 292 F.2d 381, 383 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961); *In re Warrick*, 70 F.3d 736, 740 (2d Cir. 1995); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); *In re Ralston Purina Co.*,

726 F.2d 1002, 1005 (4th Cir. 1984); *Lemon v. Druffel*, 253 F.2d 680, 685 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958); *In re National Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *Kasey v. Molybdenum Corp.*, 408 F.2d 16, 19-20 (9th Cir. 1969); *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 692 (10th Cir. 1965); *In re Ricoh Corp.*, 870 F.2d 570, 573 n. 5 (11th Cir. 1989)). While the courts of appeals certainly may decline to grant mandamus under the circumstances of a particular § 1404(a) case, no circuit has imposed a blanket prohibition on the use of mandamus in venue transfer cases. Moreover, because the Fifth Circuit granted mandamus based on "extraordinary errors" of law far exceeding a simple reweighing of the transfer factors, this case does not even remotely present the question of whether such a mere reweighing of the transfer factors would provide an adequate basis for mandamus. *See* App. at 28a.

II. Petitioners Concede That the Use of Mandamus to Correct Errors of Law in the Context of § 1404(a) "Is Not Controversial," But That is All That Occurred Here

Petitioners' principal claim is that the Fifth Circuit improperly granted mandamus "for no other reason than that it disagreed with" the district court's legitimate exercise of its discretion under 28 U.S.C. § 1404(a). Pet. at 19. But the Singletons concede that, in the context of § 1404(a), "mandamus is not controversial 'if the issue goes to the power of the district court to make the order it did and *only a question of law is presented*.'" Pet. at 11-12 (emphasis added) (quoting 15 CHARLES A. WRIGHT, ARTHUR R.

MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3855 at 325 (3d ed. 2007)). They further acknowledge that "[a]lmost all courts agree that the writ [of mandamus] can be used *if the trial court made an error of law*, as by . . . considering an impermissible factor in passing on the motion . . . ." Pet. at 12 (emphasis added) (quoting 15 WRIGHT, MILLER & COOPER § 3855 at 330). Thus, by its own terms, the merit of the Singletons' petition stands or falls on its claim that this is *not* a case involving an "error of law" by the district court resulting in the misapplication of § 1404(a). *See* Pet. at 14.

Yet, in granting mandamus, the *en banc* Fifth Circuit identified not one, but multiple material legal errors committed by the district court:

> The errors of the district court—applying the stricter *forum non conveniens* dismissal standard, misconstruing the weight of the plaintiffs' choice of venue, treating choice of venue as a § 1404(a) factor, misapplying the *Gilbert* factors, disregarding the specific precedents of this Court in *In re Volkswagen I*, and glossing over the fact that not a single relevant factor favors the Singletons' chosen venue—were extraordinary errors.

App. at 28a.

Rather than confront the specific legal errors identified by the Fifth Circuit, Petitioners instead try to recast the Fifth Circuit's holding as an improper interference with the district court's discretion by

"appellate judges [who] . . . cannot help themselves and think it essential that they plunge in to make sure the case is tried in their preferred forum." Pet. at 30a. But examination of the district court's orders denying Volkswagen's transfer motion confirms the multiple legal errors identified by the Fifth Circuit, and refutes Petitioners' argument that the *en banc* Fifth Circuit baselessly interfered with a legitimate exercise of the district court's discretion.

A. The District Court Erred as a Matter of Law by Giving "Paramount Consideration" to Plaintiffs' Choice of Venue

Neither the district court nor the Petitioners have ever identified *any* factor favoring the relative convenience of trying this case in Marshall instead of Dallas. The sole basis for the district court's refusal to transfer venue from Marshall to Dallas was Petitioners' preference for litigating there. App. at 28a. Indeed, in denying Volkswagen's motion to transfer, the district court declared that plaintiffs' choice of forum is "a paramount consideration in any determination of [a] transfer request."[5] App. at 85a.

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[5] In its order denying Volkswagen's motion for reconsideration, the district court backed away from the language in its earlier order (App. at 85a) and denied that it had given "decisive weight" to the Plaintiffs' choice of forum. App. at 79a. But given the failure of the district court to point to *any* § 1404(a) factor making venue more convenient in Marshall than in Dallas (App. at 78a-81a and 82a-93a), no other conclusion is possible.

The district court erred as a matter of law in giving "paramount consideration" to the Singletons' choice of venue. This Court has long held that a plaintiff's "forum choice should not be given dispositive weight." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, at 258 n.23 (1981). While *Piper Aircraft* is a *forum non conveniens* case, its reasoning is even more applicable in the context of § 1404(a), where the Court has indicated transfers may be made on a lesser showing of inconvenience. *See Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (stating that "Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience" than is required by the common law of *forum non conveniens*). Consistent with this Court's precedents, the Fifth Circuit—whose holdings are, of course, binding on the trial court in question—emphasized in earlier cases that a plaintiff's choice of forum "in and of itself is neither conclusive nor determinative" of the § 1404(a) transfer analysis. *In re Horseshoe Entm't*, 337 F.3d at 431-32; *In re Volkswagen I*, 371 F.3d at 203 (no venue factor is to be "given dispositive weight."); *Garner v. Wolfinbarger*, 433 F.2d 117, 119 (5th Cir. 1970).

Not only was the district court's assignment of "paramount" importance to the plaintiff's choice of venue in direct conflict with this Court's and the Fifth Circuit's precedents, it also was singularly inapposite in the circumstances of this case. Where a venue is not the home of a party, the site of the events leading to the litigation, or otherwise connected to the case, multiple circuit courts have held that a plaintiff's choice of that

venue is, at most, entitled to minimal deference.[6] Leading treatises echo this conclusion,[7] and there does not appear to be any authority to the contrary. Thus, even the lone consideration that purportedly warranted keeping this case in Marshall—Petitioners' desire to litigate there—was, at most, entitled only to minimal weight.

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[6] *See, e.g., Gross v. British Broadcasting Corp.*, 386 F.3d 224, 230 (2d Cir. 2004) ("The degree of deference to the plaintiff's forum depends in part on a number of considerations, such as the plaintiff's own connection to that forum."); *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) ("If the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter, [plaintiff's] choice is entitled to only minimal consideration."); *Chicago, Rock Island & Pac. R.R.*, 220 F.2d at 304 (holding that "[t]his factor has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff."). While other circuits have not reached this issue, district courts in literally every circuit have concluded that a plaintiff's choice of venue unconnected to the parties or events of a case is entitled to minimal or no deference.

[7] *See* 15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3848 (3d ed. 2007) ("plaintiff's venue choice is to be given less weight if he or she selects a district court with no obvious connection to the case or the plaintiff is a non-resident of the chosen forum or neither element points to that court."); 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 111.13[1][c][iii] (3d ed. 1997) ("When the chosen forum is neither the plaintiff's residence nor the place where the operative events occurred, the court is likely to override the plaintiff's choice, unless the plaintiff can show some other valid reason supports the plaintiff's choice of forum.").

In the face of multiple precedents to the contrary, the district court committed a significant legal error by affording "paramount consideration" to the Singletons' choice of venue. Thus, even under Petitioners' articulation of the mandamus standard—*i.e.*, that the writ "can be used if the trial court made an error of law" (Pet. at 12)—the Fifth Circuit acted well within its discretion granting mandamus here.

B. The District Court Erred as a Matter of Law by Treating the Plaintiffs' Choice of Venue as an Independent Factor in the Venue Transfer Analysis

The district court committed a separate legal error by treating the Plaintiffs' choice of venue as an independent factor in its venue transfer analysis. App. at 19a, n.10, 79a, and 84a-86a. While a plaintiff's choice of venue certainly is accorded deference, it is not a distinct factor in the § 1404(a) analysis. The Fifth Circuit explained:

> A plaintiff's choice of forum . . . is not an independent factor within the *forum non conveniens* or the § 1404(a) analysis. In fact, the Supreme Court has indicated that a plaintiff's choice of forum corresponds to the burden that a moving party must meet: "A defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 127 S.Ct. 1184, 1191, 167 L.Ed.2d 15 (2007) (emphasis added); *see also Gilbert*, 330

> U.S. at 507, 67 S.Ct. 839 (indicating the convenience factors and then noting "[b]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"). Although a plaintiff's choice of venue is not a distinct factor in the venue transfer analysis, it is nonetheless taken into account as it places a significant burden on the movant to show good cause for the transfer.

App. at 19a, n. 10.

"Plaintiff's choice of venue" simply is not among the transfer factors set out by this Court in the *forum non conveniens* context. *See Piper Aircraft*, 454 U.S. at 241 n. 6; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).[8]

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[8] In *forum non conveniens* cases, the private interest factors examined by the Court are: (i) "the relative ease of access to sources of proof;" (ii) "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;" (iii) "possibility of view of premises, if view would be appropriate to the action;" and (iv) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508. The public factors are: (i) "the administrative difficulties flowing from court congestion;" (ii) "the 'local interest in having localized controversies decided at home';" (iii) "the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action;" (iv) "the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law;" and (v) "the unfairness of burdening citizens in an unrelated forum with jury duty." *Piper Aircraft*, 454 U.S. at 241 n.6 (citing *Gilbert*, 330 U.S. at 509).

And the Court has indicated that these same *forum non conveniens* factors are to be considered in evaluating § 1404(a) motions to transfer venue. *See Norwood*, 349 U.S. at 32. Accordingly, the Fifth Circuit, like other circuit courts, has explicitly "adopted the *Gilbert* factors, which were enunciated in *Gilbert* for determining the *forum non conveniens* question, for determining the § 1404(a) venue transfer question." App. at 18a, n.9 (citing *Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir. 1963)); *Ex Parte Chas. Pfizer & Co.*, 225 F.2d 720, 721-22 (5th Cir. 1955).

Again, Petitioners concede that a writ of mandamus "can be used if the trial court made an error of law . . . as by considering an impermissible factor in passing on the motion. . . ." Pet. at 12. That is precisely what happened here, as the district court erroneously added "the plaintiff's choice of forum" to the *Gilbert* factors, thereby giving inordinate weight to the plaintiff's choice of venue.

C. The District Court Erred as a Matter of Law by Applying the Stricter *Forum Non Conveniens* Dismissal Standard to a § 1404(a) Motion to Transfer Venue

This Court has established that § 1404(a) venue transfers may be granted "upon a lesser showing of inconvenience" than *forum non conveniens* dismissals. *Norwood*, 349 U.S. at 32. *See also Piper Aircraft*, 454 U.S. at 254 (noting the "relaxed standards for transfer" under § 1404(a)). As a result of *Norwood*, the Fifth Circuit has long held that the "heavy burden traditionally imposed upon defendants by the *forum non*

conveniens doctrine—dismissal permitted only in favor of a substantially more convenient alternative—was dropped in the § 1404(a) context." *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1247 (5th Cir. 1983). To obtain a "new federal [venue]," the court observed, "the statute requires only that the transfer be '[f]or the convenience of the parties, in the interest of justice.'" *Id.* (first alteration added, citation omitted).

In evaluating Volkswagen's motion, though, the district court ignored *Piper Aircraft's* "relaxed standards for transfer" under § 1404(a) and instead demanded that Volkswagen "show that 'the balance of convenience and justice *substantially* weighs in favor of transfer." App. at 85 (emphasis in original). Again, the district court applied the wrong legal standard. Lacking any factor favoring the relative convenience of Marshall over Dallas, the district court denied transfer only by imposing an incorrect standard and an elevated burden on Volkswagen. The Fifth Circuit expressly identified this error by the district court:

> [T]he district court, in requiring Volkswagen to show that the § 1404(a) factors must substantially outweigh the plaintiffs' choice of venue, erred by applying the stricter *forum non conveniens* dismissal standard and thus giving inordinate weight to the plaintiffs' choice of venue.

App. at 20a.

It was serious legal error for the district court to ignore the important differences between a statutory convenience transfer and a dismissal under the law of *forum non conveniens*. *See Norwood*, 349 U.S. at 32; *Veba-Chemie*, 711 F.2d at 1247. Combined with its other legal errors, the district court's improper invocation and application of the *forum non conveniens* standard undercuts Petitioners' contention that "the court of appeals simply revisited the district court's conclusions on each of the § 1404(a) factors, reached a different judgment about them, and ordered the transfer." Pet. at 18.

D. The District Court Erred as a Matter of Law by Disregarding Directly On-Point Fifth Circuit Precedent

It is axiomatic that a district court does not enjoy "discretion" to disregard on-point circuit precedent. *See, e.g.*, *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) ("In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them, so district judges must follow the decisions of this court whether or not they agree." (internal citations omitted)), *cert. denied*, 543 U.S. 1147 (2007). Yet, in addition to the legal errors already identified (*ante* at 13-22), the district court here committed several other legal errors by refusing to apply the § 1404(a) transfer standards expressly established by the Fifth Circuit in its recent precedents. *In re Volkswagen I*, 371 F.3d 201; *In re Horseshoe*, 337 F.3d at 431-32. In particular, the district court impermissibly broke with controlling circuit

precedent by failing to apply at least four separate requirements necessary for a proper § 1404(a) analysis under Fifth Circuit law.

1. The district court erred by treating the more than 155-mile distance between Dallas and Marshall as "not substantial" and even "negligible." App. at 87a-88a, 79a. This holding ignored the Fifth Circuit's unambiguous directive that any distance of "more than 100 miles" must be considered when analyzing § 1404(a)'s witness convenience factor. *In re Volkswagen I*, 371 F.3d at 204-05. The *en banc* Fifth Circuit expressly identified the district court's disregard for this precedent concerning distance as part of the basis for mandamus:

> In *In re Volkswagen I* we set a 100-mile threshold as follows: "When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." 371 F.3d at 204-05. We said, further, that it is an "obvious conclusion" that it is more convenient for witnesses to testify at home and that "[a]dditional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment." *Id.* at 205. The district court disregarded our precedent relating to the 100-mile rule.

App. 25a-26a.

2. The district court similarly ignored the Fifth Circuit's precedent concerning the "availability of compulsory process" factor in the § 1404(a) analysis. Just as in *In re Volkswagen I*, all non-party witnesses located in the city where the collision occurred "are outside the Eastern District's subpoena power for deposition under FED. R. CIV. P. 45(c)(3)(A)(ii)." *In re Volkswagen I*, 371 F.3d at 205, n.4. Moreover, as in *In re Volkswagen I*, any "trial subpoenas for these witnesses to travel more than 100 miles would be subject to motions to quash under FED. R. CIV. P. 45(c)(3)." *Id.* at 205, n.4. Despite this recent and directly on-point precedent arising from a substantially identical case, the district court twice concluded that "this factor does not weigh in favor of transfer." App. at 89a and 80a. The Fifth Circuit held that the district court's lack of fidelity to controlling circuit law on this factor constituted further error. App. at 23a.

3. The district court also erred by holding that the "ease of access to sources of proof" factor under § 1404(a) has been rendered superfluous "because of advances in copying technology and information storage." App. at 90a. The district court was not within its discretion to invalidate a § 1404(a) factor established by this Court and recently reiterated by the Fifth Circuit in *In re Volkswagen I*, 371 F.3d at 203 (citing *Piper Aircraft*, 454 U.S. at 241, n.6). While the precise degree of weight to which this factor is entitled obviously varies from case to case, the district court was not permitted to simply read it out of the § 1404(a) equation.

4. Most significantly, the district court erred as a matter of law by holding that the "local interest" factor

did not support transfer to Dallas because the "citizens of Marshall also have an interest in this products liability case" and "the product is available in Marshall."[9] App. at 91a. The Fifth Circuit squarely rejected identical reasoning in *In re Volkswagen I*, finding that

> [p]laintiffs have failed to demonstrate and the Eastern District court has failed to explain how the citizens of the Eastern District of Texas, where there is no factual connection with the events of this case, have more of a localized interest in adjudicating this proceeding than the citizens of the Western District of Texas, where the accident occurred and where the entirety of the witnesses for the third-party complaint can be located.

In re Volkswagen I, 371 F.3d at 206. The *en banc* Fifth Circuit was therefore brusquely critical of the district court's decision to again rely on that reasoning:

> The only contested public interest factor is the local interest in having localized interests decided at home. Here, the district court's reasoning again disregarded our precedent in *In re Volkswagen I*. There, under virtually indistinguishable facts, we held that this factor weighed heavily in favor of transfer. *Id.* at 205-06. Here again, this factor weighs heavily in favor of transfer . . . . In short, there is no relevant factual connection to the Marshall Division.

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[9] As the Fifth Circuit pointed out, there is not, in fact, a Volkswagen dealership located in the Marshall Division of the Eastern District of Texas. App. at 27a, n.13.

> Furthermore, the district court's provided rationale—that the citizens of Marshall have an interest in this product liability case because the product is available in Marshall, and that for this reason jury duty would be no burden—stretches logic in a manner that eviscerates the public interest that this factor attempts to capture. The district court's provided rationale could apply virtually to any judicial district or division in the United States; it leaves no room for consideration of those actually affected—directly and indirectly—by the controversies and events giving rise to a case. That the residents of the Marshall Division "would be interested to know" whether a defective product is available does not imply that they have an interest—that is, a stake—in the resolution of this controversy. Indeed, they do not, as they are not in any relevant way connected to the events that gave rise to this suit. In contrast, the residents of the Dallas Division have extensive connections with the events that gave rise to this suit. Thus, the district court erred in applying this factor as it also weighs in favor of transfer.

App 26a-27a. By refusing to follow *Volkswagen I* on this additional issue, the district court again erred as a matter of law.

III. Mandamus is Proper if the District Court Exercises its Discretion in an Irrational or Arbitrary Manner

Glossing over the multiple legal errors committed by the district court, Petitioners contend that mandamus was improper here because the trial court's decision "considered and applied all the traditional factors governing § 1404(a) motions." Pet. at 3. Of course, even if the district court did consider all of the proper factors and no improper ones—a contention wholly unsupported by the record[10]—the legitimate exercise of a district court's discretion involves more than merely quoting the correct legal principles. *See, e.g., Henry v. I.N.S.*, 74 F.3d 1, 4 (1st Cir. 1996) ("We have pointed out that courts can abuse discretion in any of three aspects, namely, by neglecting to consider a significant factor that appropriately bears on the discretionary decision, by attaching weight to a factor that does not appropriately bear on the decision, or by assaying all the proper factors and no improper ones, but nonetheless making a clear judgmental error in weighing them.") *In re Sternberg*, 85 F.3d 1400, 1405 (9th Cir. 1996) ("A trial court abuses its discretion if it fails to apply the correct law or if it bases its decision on a clearly erroneous finding of a material fact. A trial court also abuses its discretion if it applies the correct

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[10] As discussed *ante*, the district court improperly treated the Plaintiffs' choice of venue as "a paramount consideration." App. at 85a. It compounded this error by classifying the Plaintiffs' choice of venue as a free-standing and independent factor in the § 1404(a) analysis. *Id.* Petitioners are therefore wrong that the district court correctly considered the proper § 1404(a) factors and no improper ones.

law to facts which are not clearly erroneous but rules in an irrational manner."). Whenever discretion is conferred, there is always the implied condition that the trial court must exercise its power within limits. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996) ("We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.").

A district court cannot simply pay lip service to the appropriate legal standard even as it refuses to be guided by that standard. Quite apart from the district court's many legal errors, neither the district court nor Petitioners have ever identified a single consideration making Marshall more convenient than Dallas. As the Fifth Circuit explained, "[t]he only connection between this case and the Eastern District of Texas is plaintiffs' choice to file there." App. at 28a. That Dallas is the more convenient venue for this case is both obvious and irrefutable. The connections between this case and Dallas are overwhelming, while the connections between this case and Marshall are nonexistent. The district court's mere reference to the proper legal standard counts for little where, as here, it fails to rationally apply that standard.

The "clear abuse of discretion" standard does not confer immunity on the trial court's rulings. As Chief Justice Marshall put it, discretionary choices are left not to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807)

(No. 14692D). This axiom precisely states the standard applied by the *en banc* Fifth Circuit, and certainly does not warrant plenary review by this Court.

IV. The Courts of Appeals are Authorized to Use Mandamus to Supervise Their District Courts

While Petitioners argue that the writ of mandamus may be used only to "ensure [district courts] do not exceed their jurisdiction," this Court has held that the writ also may issue to supervise and control district courts. *See La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). Most notably, in *La Buy*, the Court recognized unequivocally that "supervisory control of district courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." 352 U.S. at 259-60. The Court added that "[t]he All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus." *Id.* Far from limiting the use of the writ, *La Buy* indicates that the courts of appeals have discretion in the use of mandamus, especially in circumstances where the district court commits persistent error. *Id.* at 255, 258 ("[T]here is an end of patience and it clearly appears that the Court of Appeals has for years admonished the trial judges of the Seventh Circuit that the practice of making reference 'does not commend itself' and 'should seldom be made, and if at all only when unusual circumstances exist.'") (internal quotations omitted).

The history of § 1404(a) transfer decisions by this particular district court confirms why the Fifth Circuit was within its discretion in granting mandamus here.

In 2003, the Fifth Circuit clarified its venue transfer jurisprudence, providing substantial guidance to the district courts on the proper adjudication of transfer motions. *See In re Horseshoe Entm't*, 337 F.3d 429, 431-32 (5th Cir.), *cert. denied*, 540 U.S. 1049 (2003). However, this district court did not follow the Fifth Circuit's instructions in *In re Horseshoe* which, in turn, led to the Fifth Circuit's grant of mandamus in *In re Volkswagen I*, 371 F.3d 201 (5th Cir. 2004). There, the Fifth Circuit spelled out in even more detail how to properly evaluate § 1404(a) transfer motions. In the present case, the district court again did not apply several of the core principles of *In re Horseshoe* and *In re Volkswagen I*. *Ante* at 23-27. The district court's failure to follow these on-point precedents again required correction by mandamus from the Fifth Circuit, which, this time, the Court chose to issue *en banc*. App. at 23a-28a.

To date, even the guidance from the *en banc* court has not been enough to break this pattern of error, as the Fifth Circuit recently issued a writ of mandamus in yet another substantially identical § 1404(a) case decided by this district court. *See In re Toyota Motor Corp. et al.*, No. 08-41323, slip op. at 1 (5th Cir. Dec. 19, 2008) (granting mandamus based on the district court's failure to follow the *en banc* Fifth Circuit's holding in *In re Volkswagen II*).

The Fifth Circuit is not alone in holding that this district court has clearly abused its discretion in interpreting and applying § 1404(a). Just two weeks ago, the Federal Circuit issued a writ of mandamus, concluding that the district court "disregarded Fifth

Circuit precedent" in denying a § 1404(a) venue transfer motion in an intellectual property case. *In re TS Tech USA Corp.*, No. Misc. 888, 2008 WL 5397522, at *4 (Fed. Cir. Dec. 29, 2008). The Federal Circuit faulted the district court for returning to reasoning that "was unequivocally rejected by the Fifth Circuit in *Volkswagen I* and *Volkswagen II*."[11] *Id.* at *4. The Federal Circuit also noted that the district court "ignored Fifth Circuit precedent in assessing the cost of attendance for witnesses," failed to apply "Fifth Circuit precedent [that] clearly forbids treating the plaintiff's choice of forum as a distinct factor in the § 1404(a) analysis," and "disregarded Fifth Circuit precedent in analyzing the public interest in having localized interests decided at home." *Id.* at *3-4. In sum, the Federal Circuit corrected a substantially identical clear abuse of discretion by the district court and, like the Fifth Circuit, corrected it by mandamus.

By now, this pattern of error on § 1404(a) questions has become familiar to the courts of appeals: the district court declines to transfer venue away from Marshall by giving too much weight to the plaintiff's choice of venue, while unduly minimizing the inconvenience of litigating in a venue completely unconnected to the parties or the events at issue, all in disregard of Fifth Circuit precedent

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[11] Although the district court issued its order denying TS Tech's § 1404(a) transfer motion before the Fifth Circuit issued its *en banc* decision in *Volkswagen II*, the Federal Circuit expressly noted that the "Fifth Circuit's recent en banc decision did not change any aspect of the law regarding the trial court's § 1404(a) analysis. . . ." *In re TS Tech*, at *5-6.

(*Horseshoe*, *Volkswagen I*, *Volkswagen II*). That is beyond the district court's power. *See, e.g.*, *Reiser*, 380 F.3d at 1029. Confronted with a district court not following its binding authority, the Fifth Circuit was well within its supervisory power to grant mandamus.

Finally, Petitioners urge that the use of mandamus was improper because the district court's refusal to grant a transfer under § 1404(a) is potentially subject to direct appeal following judgment. Pet. at 25-26. That argument fails for two reasons.

First, as the Fifth Circuit explained, under the harmless error rule, "a petitioner 'would not have an *adequate* remedy for an improper failure to transfer the case by way of an appeal from an adverse final judgment because [the petitioner] would not be able to show that it would have won the case had it been tried in a convenient [venue].'" App. at 29a (emphasis added) (quoting *In re National Presto Indus.*, 347 F.3d at 663 (Posner, J.)). *See also Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 952 (9th Cir. 1968) (holding that a petition for writ of mandamus seeking to compel a § 1404(a) transfer "is not truly an instance of piecemeal appeal" because a "decision denying change of venue is complete and final in itself" and the "error in denying change of venue cannot be effectively remedied on appeal from final judgment.").

Second, relying upon *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943), the Court in *La Buy* held that the issuance of a writ of mandamus to correct an error

by a district court that normally may be reviewed on direct appeal is not, of itself, prohibited. *La Buy*, 352 U.S. at 254-55. *La Buy* established that a court of appeals must have the power and discretion to supervise its district courts in order to prevent "a little cloud [from bringing] a flood's downpour." *Id.* at 258. That is all the more true in situations where the district court's error is persistent and repeated.

In the wake of *La Buy*, the circuits have used their discretionary supervisory authority to issue writs of mandamus in many circumstances to control their district courts. *See, e.g.*, *LaSalle Nat'l Bank v. First Connecticut Holding Group, LLC.*, 287 F.3d 279, 292 (3d Cir. 2002) (holding that the All Writs Act, 28 U.S.C. § 1651(a), authorized the court of appeals to use its supervisory power to reassign a case to a different judge on remand); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1440 (9th Cir. 1987) (finding it necessary to use the supervisory power of the appellate courts to vacate a district court order, despite the fact that the "court did not abuse its discretion in entering the order"); *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976) ("In recent years, however, federal courts, with the Supreme Court's approval, have come to appreciate the usefulness and flexibility of mandamus in other, less extreme, situations. In particular, mandamus has emerged as an appropriate remedy in the supervision of district courts by the various courts of appeals."); *Knight v. Alsop*, 535 F.2d 466, 469 (8th Cir. 1976) ("In this particular instance, judicial economy can be served by exercising the 'supervisory control of the District

courts . . . necessary to proper judicial administration in the federal system.'"). Consistent with these precedents, the Fifth Circuit expressly invoked its supervisory authority over the district court to issue the writ here: "Further, writs of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case." App. at 30a.

In the final measure, mandamus is a critical tool for the courts of appeals to use in supervising and controlling district courts. Depriving the courts of appeals of the ability to correct recurring error via mandamus would give district courts license to ignore circuit precedent and would disrupt uniform application of the law within a circuit. Delaying the correction of systematic error until, at the earliest, direct appeal would create the very sort of "added delay and inefficiency" of which Petitioners complain. Pet. at 29. In view of the factual circumstances of this case, Petitioners have not presented even a close case for revisiting *La Buy* and its progeny and stripping the courts of appeals of the important supervisory tool of mandamus.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

RICHARD SINGLETON, RUTH SINGLETON and AMY SINGLETON,

Petitioners,

v.

VOLKSWAGEN OF AMERICA, INC., and VOLKSWAGEN AG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTION

Civil procedure professors who support the granting of certiorari in this case estimate that over ten thousand § 1404(a) rulings issue each year. *See* Brief of Civil Procedure Law Professors as *Amici Curiae* at 13. At stake here is whether courts of appeals may intervene in these cases before final judgment, reweigh the applicable factors and determine the venue themselves – or whether they will honor the long-established rule limiting mandamus to those decisions exceeding the district court's power and jurisdiction.

Volkswagen argues that the decision below is correct because it comports with this Court's mandamus precedent, because courts agree that errors of law are subject to interlocutory correction via mandamus, and because the Fifth Circuit acted within its authority to supervise the district courts. Each of these defenses falls short. This Court should grant certiorari to resolve the persistent conflicts and confusion surrounding mandamus review of transfer rulings and reaffirm the vitality of the final judgment rule.[1]

---

[1] In their Petition, the Singletons noted that, as of the time of filing, the Fifth Circuit had not yet ruled on their motion to stay the mandate pending decision on certiorari. Pet. at 11 n.3. On December 11, 2008, the court denied the motion "without prejudice to filing a further motion if certiorari is granted." The case remains docketed in the Eastern District, as no party has moved to effect the transfer and it has not occurred *sua sponte*, and substantial additional discovery remains before the case will be ready for trial.

ARGUMENT

I. Volkswagen is Wrong In Claiming that the Majority's Decision Follows this Court's Mandamus Precedent

Volkswagen argues initially that the decision below is faithful to this Court's mandamus precedent, but its argument rests on wrenching the phrase "clear abuse of discretion" from the context in which it appears in *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004), and *Mallard v. U.S. Dist. Ct.*, 490 U.S. 296 (1989). *See* Opp. at 8-12. The court below also relied heavily on *Cheney* in this regard. App. 7a.

It is clear that, when read in context, the phrase "clear abuse of discretion" in *Cheney* and *Mallard* refers specifically to action by the trial court beyond its power or jurisdiction. In *Cheney*, which turns on the unique characteristics of litigation involving the Chief Executive, both the sentence in which the phrase appears and the preceding sentence discuss extra-jurisdictional action. *See* 542 U.S. at 380. In *Mallard*, this Court found that the district court "plainly acted beyond its 'jurisdiction.' " In *Mallard*, this Court found that "the District Court plainly acted beyond its 'jurisdiction' as our decisions have interpreted that term." 490 U.S. at 309.

More importantly, in using the phrase "clear abuse of discretion," the *Cheney* and *Mallard* Courts were quoting *Banker's Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953). *See* 542 U.S. at 380; 490 U.S. at 309. *Banker's Life*, in turn, makes clear that mandamus is unavailable except in cases of "abuse of judicial power," and that "jurisdiction need not run the gauntlet of reversible errors." 346 U.S. at 382. *Banker's Life* specifically

rejected mandamus as an avenue to review transfer orders that, as here, are properly within the district court's jurisdiction because such rulings, "even if erroneous," are "reviewable upon appeal after final judgment." *Id.* at 382-83. Because it involves the closely related provision at 28 U.S.C. § 1406(a), *Banker's Life* is obviously the most apposite decision here, but Volkswagen devotes all of one sentence to it. Opp. at 11.

It is also notable that the relevant passage in *Banker's Life* reserves mandamus for "the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' *of the sort held to justify the writ in DeBeers Consol. Mines v. U.S.*, 325 U.S. 212, 217 [(1945)]." 346 U.S. at 383 (emphasis added). In *DeBeers*, this Court used mandamus to overturn an injunction the district court lacked statutory or equitable power to enter, observing that mandamus should "not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do – when its action is not mere error but usurpation of power – the situation falls precisely within" the All Writs Act. 325 U.S. at 217. Here, the district court was surely "exercis[ing] conceded judicial power," *id.*, when it ruled on Volkswagen's § 1404(a) motion, even if it erred and should have transferred the case. *See* App. 33a ("even the majority does not contend that the district court exceeded its power or authority under § 1404(a)"). Thus, this not remotely a case "of the sort held to justify the writ in *DeBeers*." 346 U.S. at 383.

Like the seven dissenters here, the Fourth Circuit also takes the view that "*Mallard* explicitly equates

'clear abuse of discretion' with the 'usurpation of the judicial power' standard." *In re Catawba Indian Tribe of S. Carolina*, 973 F.2d 1133, 1136 n. 2 (4th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993); *accord* App. 31a, 33a, 41a-46a. To the degree there are differing interpretations of the meaning of "clear abuse of discretion" in this setting, and uncertainty caused by the interplay between *Cheney* and *Mallard* and previous mandamus decisions like *Banker's Life*, this confusion should now be resolved by this Court.

In sum, Volkswagen's attempt to harmonize the decision below with this Court's mandamus precedent rests on a misreading of *Cheney* and *Mallard* and entirely ignores innumerable other decisions of this Court stretching back well over a century. *See* Pet. at 15-16 (collecting cases).

II. This Case Squarely Presents the Conflict Over Mandamus Review for Abuse of Discretion in § 1404(a) Cases

Volkswagen essentially concedes that the circuits are divided regarding use of the All Writs Act to review transfer orders for abuse of discretion. *See* Opp. at 2-3, 12. It argues instead that any conflict is irrelevant because (i) all courts agree that mandamus is appropriate to correct errors of law in § 1404(a) rulings, and (ii) nothing more occurred here. It is wrong on both counts.

A. Mandamus is Unavailable to Review Transfer Rulings for Abuse of Discretion Regardless of Whether They Contain Errors of Law or Errors of Fact

Volkswagen claims – mistakenly – that the Singletons agree that mandamus is appropriate to review transfer orders where "only a question of law is presented." Opp. at 13. This misreading of the Singletons' position appears to stem from the petition's quotation of two passages from Wright and Miller's treatise. *Id.* at 13-14. The first passage notes that mandamus review is not controversial "if the issue goes to the power of the district court to make the order it did and only a question of law is presented." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3855 at 325 (3d ed. 2007); Pet. at 11-12. This sentence makes clear that both the power of the district court *and* a question of law must be involved to justify mandamus; it cannot be read to mean that mandamus is available to correct non-jurisdictional legal errors.

The second passage refers to errors of law such as "transferring a case to a forum that is not proper under the statute, or considering an impermissible factor in passing on the motion, or by failing to give a proper hearing to the parties." *Id.* at 330; Pet. at 12. Significantly, though, these errors implicate the power of the district court under § 1404(a). Thus, because § 1404(a) requires that transfer be to a district where the case "might have been brought," courts lack power to transfer a case somewhere else. *See Hoffman v. Blaski*, 363 U.S. 335, 342-44 (1960); *Sunbelt Corp. v. Noble*,

Denton & Assoc., Inc., 5 F.3d 28, 30 (3d Cir. 1993). Similarly, because the section requires transfer to be "for the convenience of parties and witnesses, in the interest of justice," some courts have granted mandamus on the ground that district courts lack power to base the decision on totally unrelated considerations, such as the district court's distaste for a certain category of cases. *See, e.g., In re Scott*, 709 F.2d 717, 721-22 (D.C. Cir. 1983).

More importantly, this Court's mandamus decisions make clear that errors of law do not support mandamus relief absent some action beyond the trial court's jurisdiction or power. In *Banker's Life*, as here, the petitioner complained of a legal error by the district court, namely, its rejection of a co-conspiracy or agency theory of venue. *See* 346 U.S. at 380-81. Still, this Court held mandamus unavailable because "the *ruling on a question of law* decisive of the issue . . . was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it." *Id.* at 382 (emphasis added). As Justice Cardozo observed in *I.C.C. v. U.S. ex rel. Campbell*: "Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact." 289 U.S. 385, 393 (1933). Several other of this Court's decisions have denied mandamus relief though the action complained of was a purported error of law. *See, e.g., Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402-06 (1976) (applicability of privilege); *Will v. U.S.*, 389 U.S. 90, 94-99 (1967) (whether government must disclose criminal trial witnesses); *Ex Parte Park Square Auto. Station*, 244 U.S. 412, 414-15 (1917) ("clearly erroneous construction of the statute"); *accord In re*

Federal-Mogul Global, Inc., 300 F.3d 368, 384 (3d Cir. 2002) (in § 1404(a) case, "clear error of law [must] at least approach[] the magnitude of an unauthorized exercise of judicial power") (internal quotations omitted), *cert. denied*, 537 U.S. 1148 (2003).

Thus, even if Volkswagen were correct in its claim that the district court's transfer ruling resulted from legal error, there is still no basis for mandamus as long as the court acted within its power and jurisdiction in considering and deciding Volkswagen's motion one way or the other. If mandamus is to be available every time a court of appeals concludes that a trial judge has made a legal error in a pretrial ruling like a § 1404(a) order, very little will remain of the final judgment rule – even if such errors are dramatized by calling them "clear" or "patent."

B. The Fifth Circuit Merely Substituted its Judgment for that of the District Court

In any event, Volkswagen's description of the district court's decision as the product of "a series of grave and recurring legal errors" is inaccurate. Opp. at 1. Volkswagen argues initially that the district court erroneously overvalued the plaintiff's choice of forum by referring to it as "a paramount consideration," treating it as a separate factor weighed with the others, and stating that the balance should "*substantially* weigh[] in favor of transfer." Opp. at 15-22. As the dissent recognized, however, these

formulations are commonplace in § 1404(a) rulings. App. 35a. Moore's treatise confirms the point:

> As a general rule, the plaintiff's choice of forum is given significant weight and will not be disturbed unless the other factors weigh substantially in favor of transfer. The amount of deference given to the plaintiff's choice of forum ranges from considering it the "paramount" concern, to considering it merely one of the many relevant factors, with various formulations in the middle.

17 James W. Moore, *Moore's Federal Practice* 3d § 111.13[1][c] at 111-68 (3d ed. 1997).

Regardless of the boilerplate phraseology, the district court fully considered the other standard § 1404(a) factors and expressly stated that "decisive weight" had not been given to the Singletons' choice of forum, but that it was simply one of many factors in play. App. 79a. And previous Fifth Circuit decisions – good law at least until the decision below – have used similar language. *See, e.g., In re McDonnell-Douglas Corp.*, 647 F.2d 515, 517 (5th Cir. 1981) ("unless the balance is strongly in favor of the defendant," plaintiff's choice should not be disturbed); *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966) (treating plaintiff's choice as separate factor). Indeed, in one of the recent Fifth Circuit decisions Volkswagen claims the district court ignored, the court held that "the plaintiff's choice of forum is clearly a factor to be considered but in and of itself it is neither conclusive nor determinative."

In re Horseshoe Entertainment 337 F.3d 429, 434 (5th Cir.), *cert. denied*, 540 U.S. 1049 (2003); Opp. at 30. That is exactly how the district court treated the issue here.[2]

The same is true as to the other asserted legal errors. Volkswagen claims that the district court ignored a prior Fifth Circuit case, *In re Volkswagen, AG*, 371 F.3d 201 (5th Cir. 2004) ("*Volkswagen I*"), regarding the significance of distances over 100 miles. Opp. at 23-24. But the district court recognized and distinguished *Volkswagen I* because the distances involved there were far greater, and the first panel of the Fifth Circuit to consider Volkswagen's mandamus petition in this case agreed. App. 88a, 73a-75a. Nor did the Fifth Circuit hold in *Volkswagen I* that the 100-mile threshold is an inflexible command requiring transfer in all cases, either as a matter of witness convenience or because of the availability of compulsory process. *See Volkswagen I*, 371 F.3d at 204-05 and n.4. Regarding the "sources of proof" factor, the district court's recognition that it carries less weight today is widely shared. *See* 17 *Moore's*

---

[2] Volkswagen repeatedly accuses the district court of error because no factor favors Marshall. *See* Opp. at 15, 21, 28. But the question presented by the motion was whether Volkswagen carried its burden, however defined, to show that transfer would materially advance convenience and justice. Given the negligible distances involved, the absence of significant documents in Dallas, Volkswagen's failure to identify key witnesses or those truly likely to testify, and the fact that only two people objected to making what is only a two-hour drive on a major highway (assuming they would actually appear at trial), the court was well within its discretion in concluding that Volkswagen failed to carry its burden. The question was not what factors favor Marshall.

§ 111.13[1][h] at 111-85. As for the "local interest" factor, the district court held that the Dallas location of the incident gave that forum a "slight" edge; it simply also acknowledged that, in a products liability case, consumers elsewhere have some interest too. App. 88a, 91a.

In the end, issues such as the relative inconvenience imposed by this or that driving distance or the relative significance of competing local interests are questions of judgment and degree endemic to § 1404(a) balancing – as witnessed by the repeated differences so many judges have expressed over the facts in this case. The fundamental question presented here is whether these judgment calls are to be made by the district courts or the courts of appeals. In this case, the Fifth Circuit simply intervened before judgment, proceeded factor-by-factor, subtracted weight from the plaintiff's choice of forum, added weight to the witness travel factor and others, and ordered transfer. There is no description for this exercise other than reweighing and rebalancing.

III. Supervisory Mandamus is Inapplicable

Finally, Volkswagen invokes *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) to argue that the *en banc* majority properly acted to supervise and correct the district court. Opp. at 29-34.

LaBuy and *Schlagenhauf* involved district courts that exceeded their power by repeatedly and deliberately violating court-promulgated rules. In

LaBuy, the orders in question were called "beyond the [trial] court's power," and this Court referred to the district court as having engaged in "little less than an abdication of the judicial function." 352 U.S. at 254, 256. In *Schlagenhauf*, this Court described the question presented as involving "a substantial allegation of usurpation of power." 379 U.S. at 111; *accord A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 446 (2d Cir. 1966) (Friendly, J., dissenting) (*LaBuy* represents "traditional use of mandamus" because trial court exceeded its power). As discussed throughout, the district court here may have erred in denying Volkswagen's § 1404(a) motion, but it acted within its power and jurisdiction in ruling one way or the other on transfer.

In addition, *LaBuy* limited itself to the use of mandamus to enforce court-ordered rules. It specifically distinguished *Banker's Life* because that "case did not concern rules promulgated by this Court but rather, an Act of Congress, the venue statute." 352 U.S. at 257. Hence, on its own terms, *LaBuy* is inapplicable here.

Above all, the district court has not engaged in a "deliberate policy in open defiance" of § 1404(a) or circuit precedent. *Will*, 389 U.S. at 102. Nor did the *en banc* majority rely on past transgressions by this district court or document any pattern of intentional disobedience. *See, e.g., id.* at 102, 105-06 ("record devoid" of necessary pattern). Rather, the district court used conventional formulations of the applicable law and did nothing more than engage in run-of-the-mill discretionary weighing and balancing. The first appellate panel to hear

Volkswagen's petition found that the district court did not intentionally violate, but properly distinguished, *Volkswagen I*. App. 74a. This is simply not a case where mandamus can be justified as necessary supervision under *LaBuy*.[3]

---

[3] Volkswagen attempts to bolster its case for supervisory mandamus by referring to two appellate decisions that post-date the decision below. Opp. at 30-31. In one of these, *In re TS Tech USA Corp.*, __ F.3d __, 2008 WL 5397522 (Fed. Cir., Dec. 29, 2008), the district court's § 1404(a) ruling occurred one month *before* the decision below. *See id.* at * 1. Thus, it cannot provide support for any claim of post-decision disobedience by the district court. The other § 1404(a) ruling post-dated the decision below but involved intra-district transfer and other discrete facts and circumstances with no demonstrated relevance to the present case. *In re Toyota Motor Corp.*, No. 08-41323 (5th Cir., Dec. 19, 2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Petitioners,

v.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN AG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This *amici curiae* Brief in Support of the Petition for Writ of Certiorari is filed jointly by the previously listed law professors, all of whom teach and write in the area of civil procedure. Because of our scholarly work in the area, *amici* have a strong interest in the law's development. *Amici* file this brief in their individual capacities. Law school information is presented for identification purposes only, and indicates an endorsement of the views expressed in this brief only by the individuals listed.

SUMMARY OF ARGUMENT

Confusion exists among the lower courts as to whether and under what circumstances a writ of mandamus may issue to correct a trial court's abuse of discretion in granting or denying a transfer of venue under 28 U.S.C. § 1404(a). Specifically, confusion exists over whether and to what extent the

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person other than *amici* made a monetary contribution to the preparation or submission of this brief.

The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

appellate court may independently assess and reweigh the convenience of the parties and witnesses and the interests of justice. Some courts refuse to engage in any reweighing and accord substantial deference to the balance of conveniences that the district court struck. Other courts such as the Fifth Circuit in this case have conducted detailed reviews of the circumstances supporting the convenience of the parties and witnesses and the interests of justice and accorded little deference to the district court's balance of these factors.

This confusion among the circuits has the potential to impact a sizeable and stable number of cases pending before the lower courts. One group of commentators has estimated that transfer motions are granted in between 1.2% to 1.5% of the non-prisoner civil cases terminated in federal court. Those same commentators estimate that as many as 10,000 transfer motions may be filed in federal court each year. The potential cost and delay occasioned by the type of broad mandamus review sanctioned below has the potential to significantly impact each of these cases in which a transfer motion is filed. It also provides an incentive for parties to file transfer motions in more cases.

Amici urge this Court to grant the Petition for a Writ of Certiorari to resolve the confusion among the lower courts as to the appropriate standard of review on mandamus and to narrowly circumscribe the power of the circuit courts to review discretionary transfer decisions through mandamus. Such narrow

limits on mandamus review will better comport with congressional intent embodied in 28 U.S.C. § 1292 and help reduce costs and delays associated with litigation over forum choice.

ARGUMENT

I. This Court Should Grant the Petition for Writ of Certiorari Because Confusion Exists Among the Lower Courts as to When a Circuit Court May Issue a Writ of Mandamus to Review a Discretionary Decision to Grant or Deny a Transfer

Section 1404(a) of the Judicial Code grants a district court discretion to transfer a case before it to another district where it might have been brought if transfer will be "for the convenience of the parties and witnesses and in the interests of justice." 28 U.S.C. § 1404(a). In the instant case, shortly after Plaintiffs filed their initial complaint, Defendants moved to transfer the action from United States District Court for the Eastern District of Texas to the United States District Court for the Northern District of Texas. (*See* Cert. Pet. App. E.) The district court denied the motion to transfer, concluding in a detailed opinion that the interests of justice and the convenience of the parties and witnesses did not warrant transfer. (*See* Cert. Pet. App. D & E.) Sitting *en banc*, the Fifth Circuit issued a writ of mandamus to correct what it characterized as a "clear abuse of discretion," (Cert. Pet. App. A at 30a), and a "patently

erroneous" result, (Cert. Pet. App. A at 28a, 30a), on the part of the district court in refusing to transfer the case. In reaching its decision, the Fifth Circuit undertook a detailed review of the circumstances supporting the convenience and justice factors articulated in Section 1404(a) and disagreed with the district court's conclusion as to each of these factors. (*See* Cert. Pet. App. A at 13a) ("We 'review[ ] carefully the circumstances presented to and the decision making process' of the district court." *In re Horseshoe Entm't*, 337 F.3d 429, 432 (5th Cir. 2003)); (*see* Cert. Pet. App. A, at 22a-28a).

As the Petitioner for a Writ of Certiorari documents, confusion exists among the lower courts over whether and under what circumstances mandamus will lie in a case such as this to review the district court's exercise of its discretion to deny or grant a Section 1404(a) transfer. Conflict exists not only amongst the circuit courts but within the circuits as well. Indeed, a leading treatise has observed that "there is no agreement on the use of the writs to review the trial court's exercise of its discretion," 15 Charles Alan Wright, Arthur Miller & Edward Cooper, FEDERAL PRACTICE AND PROCEDURE § 3855 at 384 (3d ed. 2007), and characterized the decisions of the courts of appeals as "in hopeless conflict." *Id.* (quoting *Hustler Magazine v. U.S. District Court*, 790 F.2d 69, 70 (10th Cir. 1986)); *see also Roofing & Sheet Metal Servs. v. La Quinta Motor Inns*, 689 F.2d 982, 987 (11th Cir. 1982) ("There is substantial disagreement among the circuits, and some apparent confusion

within the respective circuits, concerning the appropriate role of mandamus as a remedy for abuses of discretion by district courts in deciding motions under § 1404(a)."); Carolyn Kelly MacWilliam, *Mandamus, Prohibition, or Interlocutory Appeal as Proper Remedy to Seek Review of District Court's Disposition of Motion for Change of Venue Under § 1404(a) of Judicial Code*, Annotation, 28 A.L.R. FED. 2D 311, 331 (2008) (noting that some courts have permitted mandamus review where "there was a clear-cut case of an abuse of judicial discretion below" while other courts have prohibited review "even if the trial judge abused his or her discretion"); David E. Steinberg, *The Motion to Transfer and the Interest of Justice*, 66 NOTRE DAME L. REV. 443, 476 (1990).

A few decisions appear to conclude that where a district court has authority to transfer a case and where the district court has considered the appropriate factors in weighing whether to transfer a case, mandamus will not lie to correct an abuse of discretion in weighing those factors. For example, in *All States Freight v. Modarelli*, 196 F.2d 1010, 1012 (3d Cir. 1952), the Third Circuit denied a petition for a writ of mandamus in a case in which the district court had refused a motion to transfer from a court that lacked jurisdiction over potential third-party defendants to a district court which had jurisdiction over those third-party defendants. In denying the writ, the court noted that it would not grant mandamus review where the district court had considered

the interests stipulated in the statute in reaching its decision to grant or deny a transfer. *Id.*

Likewise, in *In re Josephson*, 218 F.2d 174, 182-83 (1st Cir. 1954), the First Circuit dismissed a petition for a writ of mandamus, seeking review, in part, on the ground that the district court abused its discretion in balancing the conveniences of the parties to grant the transfer. In so doing, the court noted:

> As to the second of these contentions, that the order of transfer was an "abuse of discretion" under the circumstances, we are clear that as a matter of general policy we ought not to go into that in the present proceeding. . . . No doubt upon occasion a district court within this circuit may make an error of judgment in transferring a case to a district outside the circuit. So, too, a district court outside our circuit may on occasion make a similar error of judgment in transferring a case to a district court within this circuit. We do not anticipate that, on balance, our potential appellate jurisdiction will suffer any significant impairment. On the other hand, § 1404(a) provided an administrative facility that was supposed to contribute to the convenience and expedition in the disposition of the cases. This policy would certainly be defeated if the courts of appeals in the transferor district should make it a routine practice to hold up trials of a case pending review on mandamus of the question of where the case ought to be tried. . . . Accordingly, we serve notice that in the future,

> except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus.

Id. Though not expressly considering requests for mandamus review of exercises of discretion, subsequent cases have reiterated this prohibition. *See, e.g.*, *In re Federal-Mogul Global*, 300 F.3d 368, 378-79 (3d Cir. 2002) ("Generally, a writ will only issue if the district court did not have the power to enter the order and then 'only if the party seeking the writ meets its burden to demonstrate that its right to the writ is clear and indisputable.'"); *accord Carteret Savings Bank v. Shushan*, 919 F.2d 225, 232 (3d Cir. 1990) ("We are well aware, of course, that the mere fact that the district court has made an error is not in itself the basis for the issuance of a writ of mandamus. In general, we may issue the writ only if a district court did not have the authority to make an order.").

Other courts allow mandamus review for abuse of discretion. However, even amongst these courts, confusion exists as to the circumstances under which mandamus will lie. For example, in *Toro Comp. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977), the Eighth Circuit recognized limited mandamus review of a district court's exercise of its discretion. The court noted that a writ would issue only to remedy "manifest judicial arbitrariness." *Id.* However, it refused to

engage in any independent weighing of the convenience and justice factors. The court explained that "[u]nless it is made clearly to appear that the facts and circumstances are without any basis for a judgment of discretion, the appellate court will not proceed further to examine the district court's action in the situation. If the facts and circumstances are rationally capable of providing reasons for what the district court has done, its judgment will not be reviewed." *Id.* Thus, the court upheld the district court's transfer order with little discussion, noting only that the issues raised in the transferred claims were "obviously" embraced in a related case pending in the transferee district. *See also Kasey v. Molybdenum Corp. of America*, 408 F.2d 16, 20 (9th Cir. 1969) ("We decline to issue the writ when it appears from a well-reasoned holding by the trial judge that he has considered the issues listed in 1404(a) and has made his decision accordingly. It is not our function to substitute our judgment for that of the judge most familiar with the problem.").

In *In re National Presto Indus.*, 347 F.3d 662 (7th Cir. 2003), the Seventh Circuit also recognized the availability of mandamus review to correct an abuse of discretion under exceptional circumstances only. However, the court was willing to engage in more detailed review of the convenience and justice factors. The court held that mandamus should be granted only if the district court "so far exceeded the proper bounds of judicial discretion as to be legitimately considered usurpative in character or in violation of

a clear and indisputable legal right, or at the very least, patently erroneous." *Id.* at 663 (quoting *In re Rhone-Poulenc*, 51 F.3d 1293, 1295 (7th Cir. 1995) and *In re Sandahl*, 980 F.2d 1118, 1119 (7th Cir. 1992)). In *National Presto*, the SEC instituted civil enforcement proceedings in the Northern District of Illinois where the SEC's Midwest Regional Offices are located. *Id.* at 663, 664. The district court refused to transfer the action to the Western District of Wisconsin where the defendant's corporate headquarters were located, and the defendant sought a writ of mandamus from the Seventh Circuit. *Id.* at 663, 664. According great deference to the district court's balance, the Seventh Circuit denied mandamus despite recognizing that nearly all of the convenience and justice factors favored litigation in the Western District of Wisconsin. The court noted that all of the defendant's potential witnesses, some of whom would be reluctant to testify, were within the subpoena power of the Western District of Wisconsin but outside of the subpoena power of the Northern District of Illinois; that all of the original documents in the case were located within the Western District of Wisconsin; that the Western District of Wisconsin had a lighter docket than the Northern District of Illinois; and that the only people who would be inconvenienced by litigation in the Western District of Wisconsin were the members of the SEC's Midwest Regional Office staff. *Id.* at 664. Nonetheless, the court concluded that even though the balance of convenience favored litigation in the Western District of Wisconsin, "the balance is not so far askew as to justify the

extraordinary relief sought by Presto." *Id.* at 964. Thus, the Seventh Circuit was willing to engage in some independent review of the convenience and justice factors, but it accorded great deference to the balance struck by the district court.

In contrast, in *In re Ralston Purina Comp.*, 726 F.2d 1002 (4th Cir. 1984), the Fourth Circuit purported to recognize only limited mandamus review of discretionary decisions to grant or deny a transfer. However, like the Fifth Circuit in the instant case and other cases, *see In re Horseshoe Entm't*, 337 F.3d 429 (5th Cir. 2003) (issuing writ of mandamus to the Middle District of Louisiana), the court engaged in its own weighing of the convenience and justice factors. The court stated that a clear and indisputable right to a writ of mandamus required "considerably more strained circumstances than does a mere abuse of discretion" and that such a clear and indisputable right existed only if the district court's abuse of discretion "amount[ed] to a judicial usurpation of power." *Id.* at 1005 (quoting *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 35 (1980)). Ultimately, the court refused to issue the writ of mandamus directing the district court to sever and transfer the cases before it. However, in so doing, it reviewed and rejected the district court's conclusion that the convenience of the parties would be best served by trial in the original forum. *Id.* at 1005. It also noted that the district court gave little consideration to the convenience of the witnesses. *Id.* at 1005-06. It then conducted its own review of the convenience of the witnesses and upheld the district court's decision based on its independent

conclusion that the convenience of the plaintiffs' witnesses would be better served by trial in the original forum. *Id.* at 1006.

Likewise, subsequent to this case, a panel of the Federal Circuit has interpreted the Fifth Circuit's approach in this case to allow for broad mandamus review. In *In re TS Tech USA Corp.*, 2008 WL 5397522 (Fed. Cir. Dec. 29, 2008), a panel of the Federal Circuit, applying Fifth Circuit law, issued a writ of mandamus to the Eastern District of Texas to correct what the panel concluded was a clear abuse of discretion in refusing to transfer the case before it to the Southern District of Ohio.

On the far side of the spectrum, at least one court has purported to review for "clear abuse of discretion," although it ultimately issued a writ ordering return of the case because it concluded that the district court failed to consider the relevant convenience and justice factors rather than because it disagreed with the balance struck by the district court. *In re Warrick*, 70 F.3d 736 (2d Cir. 1995). In *Warrick*, the district court transferred the case before it in the interest of judicial efficiency to a district where "a previous case presenting the same complex facts and issues had been decided and dismissed." *Id.* at 737. The Second Circuit rejected the district court's finding of judicial efficiency, noting that because the related case had been resolved, transfer did not allow for consolidation or allow the defendants to defend against the related claims in a single setting. *Id.* at 740. However, the court also found that the district court abused its discretion because it failed to even

consider the convenience of the parties as required by Section 1404(a). *Id.* Thus, the court granted relief not where it disagreed with the district court's balance but only where the district court failed to balance all relevant factors.

II. The Court Should Grant the Petition Because Avoiding the Cost and Delay Caused by Mandamus Review of Discretionary Transfer Decisions Is a Matter of Importance Beyond This Case

A. Transfer Motions Are Filed in a Sizeable Number of Civil Cases

By defining the availability and scope of review of transfer motions, a decision in this case has the potential to impact any case in which a transfer motion is filed. While no data exist pinpointing the exact number of transfer motions filed each year or the percentage of cases in which transfer motions are filed, available research suggests that transfer motions are filed in a small but sizeable and stable number of civil cases. In the most extensive study of Section 1404 transfer motions available, Professors Eisenberg and Clermont analyzed information compiled by themselves and previous researchers from databases maintained by the Administrative Office of U.S. Courts to conclude that the number of transfer motions was stable if not increasing slightly. Kevin C. Clermont & Theodore Eisenberg, *Exorcising The Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1526 (1995). Professors Eisenberg and Clermont started by

looking at the number of cases terminated in a given year that arrived in the district court by transfer from another district. *Id.* They concluded that the number of transfer motions granted each year in non-prisoner cases grew in number from 1,216 in 1979 to 2,543 in 1991 and also as a percentage of non-prisoner cases from 1.2% in 1979 to 1.5% in 1991. *Id.* Based on these data and their estimated success rate for transfer motions, Professors Eisenberg and Clermont estimated that as many as 10,000 transfer petitions may be filed each year.[2] *Id.* at 1529.

A review of the Federal Court Cases: Integrated Data Base for 2007 reveals that 2,171 non-prisoner cases, or about 1.16% of the non-prisoner cases terminated in 2007, arrived in their court of termination by virtue of transfer from another district pursuant to Section 1404. INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RES., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2007, ICPSR Study No. 22300 (2008). Employing Professor Eisenberg and Clermont's suggested success ratio yields an estimate of 11,571 transfer motions filed each year. Thus, transfer motions appear to constitute a sizeable portion of the federal district court docket. The issues raised in the Petition

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[2] Professors Clermont and Eisenberg conducted a survey of reported decisions to generate a rough estimate of the ratio of unsuccessful to successful transfer motions. They then extrapolated a ratio of two to one of unsuccessful motions to successful motions from this search. *See* Clermont & Eisenberg, *Exorcising Forum Shopping*, at 1529.

for Writ of Certiorari may potentially arise in these cases. A decision in this case has the potential to impact all of these transfer cases by limiting or increasing the opportunities for the losing parties in the transfer litigation to seek appellate review of the district court decision granting or denying a transfer.

B. The Cost and Delay Associated with Mandamus Review Has a Great Impact on Each Case

Even if the number of cases affected by a decision in this case is small, the impact on any given case is significant. The decision below and other similar decisions provide an incentive for the losing parties in these transfer cases to seek mandamus review before the appellate court as a routine matter and also may encourage additional parties to file transfer motions. Routine mandamus review of discretionary transfer decisions will increase significantly the litigation costs and delay resolution in cases involving transfer motions.

As Judge King noted in her dissenting opinion, the Fifth Circuit's decision here illustrates the perils of protracted litigation surrounding procedural issues. (Cert. Pet. App. A at 42a.) Plaintiffs filed their initial complaint on May 30, 2006. (Cert. Pet. App. E at 83a.) Volkswagen filed its motion to transfer three weeks later on June 21, 2006; and the trial court issued its original order denying Volkswagen's motion to transfer on September 12, 2006. (*Id.* at 82a). Ultimately,

the trial court denied Volkswagen's motion for reconsideration on December 7, 2006 – less than six months after Plaintiffs filed their complaint. (Cert. Pet. App. D at 77a.) Mandamus proceedings, however, did not conclude before the Fifth Circuit until October 10, 2008. (*See* Cert. Pet. App. A at 1a.) Thus the parties have spent more than two years litigating the appropriate venue for this action, and a substantial portion of this delay was the result of mandamus proceedings rather than the initial transfer proceedings before the district court.

Moreover, it appears that the case would have concluded on the merits before the Fifth Circuit disposed of the mandamus petition. Discovery was scheduled to close on September 19, 2007, (Cert. Pet. App. A at 42a), and jury selection was slated to begin on October 23, 2007 – almost a full year before the Fifth Circuit issued its *en banc* opinion granting the writ of mandamus. (*See id.*) Thus, the two years the parties have spent litigating the issue of where the case will proceed is apparently more time than they would have spent litigating the merits of the case. Preparation and arguments of motions to transfer before the district court and the Fifth Circuit have increased the cost of the litigation as well. All of this litigation has taken place in a case where neither party contests the authority of the original court to hear the case, but rather the parties merely dispute the issue of whether another court 155 miles away would be more convenient. Given the close proximity of the two courts one might suspect that the cost of

this transfer litigation exceeds the incremental cost to witnesses alleged to be inconvenienced by the Plaintiffs' original choice of forum. Such a result seems at odds with Section 1404(a) – a provision seemingly intended to reduce litigation costs to parties, witnesses, and the court.

Indeed, the Fifth Circuit's decision here and the decisions of other circuits allowing broad mandamus review of discretionary transfer decisions not only seem to run counter to the purposes of Section 1404(a) but also seem to contravene the congressional prohibition on piecemeal litigation embodied in the federal Judicial Code in provisions such as Sections 1291 and 1292 limiting the scope of interlocutory review and Section 1447 limiting review of remand orders. This Court has long recognized this congressional policy against piecemeal litigation by narrowly construing doctrines and statutes allowing for interlocutory review, including narrowly construing the scope of mandamus relief.

For example, in *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33 (1980), this Court reversed a circuit court order issuing a writ of mandamus to reinstate a jury verdict after the trial court granted a motion for a new trial. The Court noted that:

> A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. . . . The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court. Where a matter is

> committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666, 98 S.Ct. 2552, 2559, 57 L.Ed.2d 504 (1978) (plurality opinion).
>
> To overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review. Under the rationale employed by the Court of Appeals, any discretionary order, regardless of its interlocutory nature, may be subject to immediate judicial review. Such a rationale obviously encroaches on the conflicting policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it.

Id. at 35.

Likewise, in *Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863 (1992), this Court recognized that narrowly construing the collateral order doctrine would render some pretrial errors virtually unreviewable. The Court, nonetheless, refused to expand the scope of the doctrine. The Court noted:

> This must be so because the strong bias of § 1291 against piecemeal appeals almost never operates without some cost. A fully litigated case can no more be untried than the law's proverbial bell can be unrung, and almost every pretrial or trial order might be called "effectively unreviewable" in the

> sense that relief from error can never extend to rewriting history. . . . But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third Cohen requirement.

Id. at 872.

This Court and the lower courts have acknowledged the wisdom of the final judgment rule in light of the increased costs interlocutory review places on parties and the judicial system. This is particularly true when interlocutory review involves review of issues surrounding the appropriateness of the forum. *See, e.g. Kirchner v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) ("The policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed,' *United States v. Rice*, 327 U.S. 742, 751, 66 S.Ct. 835, 90 L.Ed. 982 (1946), and nearly three years of jurisdictional advocacy in the cases before us confirm the congressional wisdom."). Indeed, the lower courts that have refused to extend mandamus review to correct alleged abuses of discretion in transfer decisions have declined to do so because of these costs. For example, in *All States Freight*, 196 F.2d at 1011, the Third Circuit noted:

> Now the effort is being made both in this court and elsewhere to substitute for appeal

> a review by mandamus whenever the losing party on a motion to transfer wants an advance review of the ruling on this point. We think that this practice will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried. Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.

C. The Costs and Delay Associated With Mandamus Review Are Unlikely to Produce Corresponding Increases in Accuracy

Furthermore, the costs and delay associated with mandamus review of transfer decisions come without any concomitant increases in accuracy. As Judge King recognized and as this case illustrates, transfer decisions most often take place early in litigation. (Cert. Pet. App. A at 36a.) As stated above, Volkswagen filed its initial motion to transfer the case only three weeks after the Plaintiffs filed their initial complaint. In ruling on the motion to transfer, the

district court judge necessarily needed to consider what evidence and witnesses were likely to be presented in the trial of this case in order to assess the relative convenience of the competing fora to those witnesses and the parties. Making assessments of the likely direction of litigation at this early stage in the proceeding is a speculative inquiry at best. The district court judge can be guided by her experience in past litigation to make these types of assessments. As Judge King noted:

> At this early stage, assessing what best serves the "convenience of the parties and witnesses" and "interests of justice" is hardly an exact science, since it is often unclear how the lawsuit will develop or what issues will be key. But the district court can draw on its experience with the day-to-day reality of litigation issues – an arena in which appellate courts lack expertise.

(*Id.*); *see also Ford Motor Co. v. Ryan*, 182 F.2d 329, 331-32 (2d Cir. 1950) ("Weighing and balancing are words embodying metaphors which, if one is not careful, tend to induce a fatuous belief that some sort of scales or weighing machinery is available. Of course it is not. At best, the judge must guess, and we should accept his guess unless it is too wild.").

Moreover, because of the fact-intensive nature of Section 1404(a) decisions, appellate review by mandamus is not likely to provide clear guidance to district courts or effective constraints on the exercise of discretion. Thus, review of a few decisions by

mandamus is unlikely to obviate the need for further review in subsequent cases and unlikely to bring greater uniformity to what the Fifth Circuit and commentators perceived to be inconsistencies in the district courts' application of Section 1404(a). (Cert. Pet. App. A at 30a); *see, e.g.*, David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1503 (1997); Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice*, 40 IND. L.J. 99 (1965).

CONCLUSION

For the foregoing reasons, we urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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